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IN THE

Supreme Court of the United States

October Term, 1958

No. 733

FABRIC GARMENT CO., INC., and JOSEPH ABRAMS,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Fabric Garment Co., Inc. (hereinafter "Fabric") and Joseph Abrams, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 30, 1958, affirming judgments of conviction previously entered against petitioners in the United States District Court for the Southern District of New York on indictments charging (1) unlawful sales of Government-owned serge wool in violation of 18 U. S. C. §641; (2) a conspiracy, in violation of 18 U. S. C. §371, to make false statements in connection with such serge in violation of 18 U. S. C. §1001; and (3) making false statements in connection with four Government contracts, in violation of 18 U. S. C. §1001; and af-

firming the District Court's denial of petitioners' motion for a new trial filed under Rule 33 of the Federal Rules of Criminal Procedure.

Opinions Below

The opinion of the District Court for the Southern District of New York, denying petitioners' motion for a new trial on the ground of newly discovered evidence, is not reported but is printed in the Record at R. 916-22*. The opinion of the Court of Appeals for the Second Circuit, affirming some of the convictions (and reversing others), and affirming the denial of the motion for a new trial, is not yet reported but is printed in Appendix A, *infra*, pp. 31-52. No other opinions were rendered below.

Jurisdiction

The judgments of the Court of Appeals were filed on December 30, 1958, Appendix B, *infra* (pp. 53-56). By order dated January 20, 1959, this Court extended the time of petitioners to file their petition for certiorari to and including February 28, 1959.

The jurisdiction of this Court is invoked under 28 U. S. C §1254(1). The jurisdiction of the Court of Appeals was based on 28 U. S. C. §1291; and that of the District Court on 18 U. S. C. §3231.

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* References designated "R." are to the Defendants-Appellants' Appendix in the Court below. Certified copies of that Appendix, as well as other appendices filed below, have been filed with the Clerk of this Court, pursuant to its Rule 21(c); together with the certified transcript of the proceedings below, they constitute the record on this petition.

Questions Presented

I.

Petitioners were prosecuted for allegedly selling United States Government property consisting of wool serge furnished to them under two Government contracts for manufacture into Eisenhower jackets. An essential link in the chain of circumstances from which the jury inferred guilt consisted of proof of an alleged difference between the amount of Government property delivered to the petitioners and the amount of property which the prosecution computed was accounted for by the wool contained in the jackets delivered to the government and the wool returned to the Government as scrap.

There is no dispute in the record that the prosecution knew of other non-criminal uses of the property by defendants in the course of manufacture and that it knew of still other uses by non-defendants (of which defendants were unaware) which it failed even to disclose. The prosecution, notwithstanding this knowledge, made no attempt to show that such uses did not account for the alleged shortage. Instead it vigorously urged the jury to infer guilt from the discrepancy. If this were a tax evasion prosecution, *Holland* v. *United States*, 348 U. S. 121 (1954), and related cases, would have required the prosecution to negate such leads or their significance or to prove the amount of property thus accounted for, in order to go to the jury.

The question presented is whether the rules of *Holland* v. *United States, supra,* may be disregarded in prosecutions outside the field of tax evasion which utilize the net worth or accounting type of proof, or whether the prosecution, in order to go to the jury in the case at bar, was obliged

to prove the amount of all innocent applications of the wool fabric to which it had leads and to negate all leads which, if true, would have established the defendants' innocence.

II.

The Trial Court withheld from defendants access to statements made by a Government witness prior to trial to a Government agent on the basis of the Trial Judge's *in camera* inspection and determination that the statements did not relate to the testimony of the witness so far as the Court could tell.

The question presented is whether such withholding is permissible under the decision in *Jencks* v. *United States*, 353 U. S. 657 (1957).

III.

The prosecution offered, and the Trial Court received in evidence, quantitative measurements obtained by a novel measuring device never before utilized in a Court of law and not proved or known to have been used outside of courts of law. The validity and accuracy of the method used to measure the area of wool contained in 454,814 mass-produced jackets was an essential link in the chain of circumstances from which the jury inferred guilt. That essential link was supplied only by the unsworn statement of the prosecutor in his opening, and defendants were deprived of any opportunity to cross-examine concerning the validity and accuracy of the device.

The question presented is whether in these circumstances such a denial of the right of cross-examination is a denial of due process.

IV.

Petitioners also rely upon the questions presented in the co-pending petition of Mayflower Manufacturing Corp. and Murray Berman and the arguments there made.

Statutes Involved

The statutes involved are the Act of June 25, 1948, C. 645, 62 Stat. 725, 18 U. S. C. §641; and the Act of June 25, 1948, C. 645, 62 Stat. 749, 18 U. S. C. §1001. Their provisions are reproduced in Appendix C, *infra* pp. 57-58.

Statement of the Case

The Charges

By the first indictment, petitioners Fabric and Abrams, co-petitioners Mayflower Manufacturing Corp. (hereinafter "Mayflower") and Berman and others were charged with the unlawful sale of approximately 19,000 yards of Government-owned O.D. wool, furnished to Fabric for manufacture into Eisenhower jackets, pursuant to two contracts between Fabric and the Army Quartermaster Corps, in violation of 18 U. S. C. §641 (Count I), and conspiracy to make eight false written statements in connection with those two contracts and two others, all relating to the use and disposition of Government-furnished wool, in violation of 18 U. S. Code §371 (Count III).

Two other defendants (Alert Trading Corp. and Hartman) were charged with knowingly purchasing the 19,000 yards (Count II), as well as being members of the alleged conspiracy.

By a second indictment, petitioners Fabric and Abrams, and defendant Hyman were also charged in eight Counts with making the eight false statements referred to above, in violation of 18 U. S. Code §1001.

The Judgments

Seven defendants went to trial on the indictments. The Trial Court dismissed the unlawful sale charge and the first three false statement charges as against defendant Hyman. The jury acquitted Alert and Hartman, but found the remaining defendants guilty. The Court of Appeals reversed and dismissed all convictions as to defendant Hyman, reversed and remanded the convictions on two of the false statement Counts as to Fabric and Abrams and affirmed in all other respects.

The Proof

From the evidence the jury could have found a sale of 19,000 yards of wool by Abrams through Mayflower, in which Berman acted as Abrams' agent. There was no direct proof that the 19,000 yards thus sold were Government furnished property.

To support this allegation, the prosecution offered and the Court received in evidence the following circumstantial evidence which the Court of Appeals characterized as "Not so strong, perhaps . . ." (Appendix A, p. 44):

1. A trucker, who delivered the goods, testified it looked "the same" as Government-furnished serge (R. 115, 116).*

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* Government-furnished serge is no different in appearance from privately-owned serge.

2. Almost a year after the sale, two F. B. I. men found, on the second floor of the premises from which the delivery was made, a single piece-goods ticket which had at one time been attached to a piece of serge furnished to Fabric under its first contract for Eisenhower jackets (R. 75-6, 79).*

3. Behavior said to indicate alleged consciousness of guilt on the part of Abrams and Berman (Appendix A, p. 44).

4. The keystone of the Government's case consisted of the attempt to establish that some 30,000 yards of Government serge furnished to Fabric on the first two contracts** and a total of some 46,000 yards out of the 709,000 yards furnished to Fabric on the four contracts were not accounted for by the evidence of lawful use and consumption, and were therefore available for unlawful sale.

The same proof—including the proof of sale (Appendix A, p. 47)—was relied upon to establish that Fabric and Abrams had made four false certificates that Fabric had "... returned to the designated Quartermaster depot(s) or installation(s) and/or transferred as authorized by the New York Quartermaster Procurement Agency . . ." (R. 719) all the material furnished under the contracts and that they had made four false statements of inventory on hand at the completion of the respective contracts, as alleged in the second indictment.

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*Undisputed defense testimony established that all piece goods tickets, required by the contracts to be preserved for 90 days after completion thereof, were stored in the same premises (R. 632).

**Concededly, if the 39,000 yards which were sold were Government-furnished wool, they could only have come from the wool furnished under the first two contracts, since the sales were completed before any shipments of wool to Fabric under the last two contracts.

The Proof of Unaccounted For Wool

In order to prove the existence of 46,000 yards of "unaccounted for" wool, the prosecution relied upon an equation or a simulated account. The equation was as follows: (1) area of wool delivered to Fabric less [(2) area of wool returned in form of jackets plus (3) area of scrap returned] equals (4) area of wool "unaccounted for".

The proof of items 2 and 3 of this equation offered by the prosecution was as follows:

Item (2): Employees of the Quartermaster prepared copies of the same patterns, copies of which had been supplied to Fabric for the performance of its contracts (R. 349, 356-57). With shears they cut patterns out of heavy paper in the sizes and shapes of the 25 parts, which together made up one jacket-pattern, in each of the 30 sizes of jackets manufactured by Fabric (R. 362, 448, 454, 457). They then weighed the paper parts thus cut out for each size (R. 486, 489), compared the weight of paper thus produced to the weight of a square yard of the same paper (R. 490, 542); thereby establishing a ratio of area to weight, and then computed the square yardage of the aggregate pieces of paper going into one jacket of each of the 30 sizes (R. 553-54, 563-64).

The prosecutor asserted in his opening that " . . . by simply multiplying that square yard area of the [paper parts of the] jacket, times the number of [wool] jackets which were made, the Government will prove the area, the yardage, which was used in making up these [wool] jackets . . ." (R. 41).

In accordance with this statement, an F.B.I. agent multiplied the number of jackets in each size delivered by Fabric to the Government by the yardage of paper shown for that size by the paper test (R. 363-64).

No witness testified that such an extrapolated computation and translation from area of a paper pattern prepared in a quiet laboratory experiment was a valid method of measurement of the area of wool of a jacket made in a high-speed, high-tension factory operation in which 80 layers of wool, irregularly aligned (R. 311, 332), were cut at one time by an electric "chopper" operated by cutters (R. 266-67, 269, 272-73).

Since no one so testified for the prosecution, the defense of course cross-examined no one with respect to the prosecution's unsworn espousal of this method of measurement.

Item (3): The prosecution tendered evidence of the weight in ounces of the wool scrap which was returned by Fabric to the Quartermaster. Over objection, an F.B.I. agent who was in no way qualified to express an opinion testified that he had divided this weight by 18, the "stated" weight per yard of wool furnished to Fabric.* The F.B.I.

* The "stated" weight, for classification purposes, of the wool supplied to Fabric was 18 ounces. This means that each linear yard, under specified temperature and moisture conditions, weighs in the neighborhood of 18 ounces. But the actual weight may vary by as much as 12% (R. 514). And standard Government testing procedures require a process of the most exacting conditioning before the wool may be weighed so as to establish its "normal" weight (R. 496, 498). The prosecution made no showing that the wool scrap returned by Fabric to the Government was conditioned prior to being weighed by the Government and the scanty evidence it tendered all but compels the conclusion that there was no conditioning (R. 171-73). Thus, using a divisor of 18 was unwarranted. Variations in weight due to conditioning or non-conditioning were vitally significant where the shortage sought to be established by the prosecution was one of only 6%.

agent asserted that the result of this division showed the linear yardage of clippings returned to the Quartermaster by Fabric (R. 556).

The Government's Chart

The mathematical results of the application of the prosecutor's equation are found on Government Exhibit 177, a chart 3½ feet by 2½ feet (Appendix D, *infra* p. 59). This exhibit was received in evidence over objection (R. 557) and taken into the jury room by the jurors, without guarding instructions (R. 680). It characterizes the difference between the wool supplied to defendants by the Government and the wool returned as jackets and as clippings as "unaccounted for" and as "not returned" to the Government.

The Incompleteness and Inaccuracy of the Accounting

The crucial link in the evidence relied upon to establish that the wool sold was Government property was the proposition asserted in the equation underlying the accounting that wool not returned to the Government in the form of jackets or scrap was wool "unaccounted for" and therefore available for unlawful sale.

But testimony tendered by the prosecution showed that the equation and the accounting were invalid, incomplete and inaccurate. The evidence established the obvious fact that jackets and scrap cannot account for all the woolen fabric furnished by the Government to a manufacturer of uniforms. In any such mass production there is an inevitable "consumption" of wool which cannot be returned.

In addition, according to the prosecution's evidence, an unknown quantity of wool fabric, largely in the form of scrap, was used by Fabric's employees for a variety of purposes as normal phases in the process of manufacture, such as the following:

(1) to tie up bundles of cut parts, which could not be tied by rope, lest the parts be torn (R. 313-14);

(2) to clean and oil machines (R. 315);

(3) to test machines to see if they sewed properly (id.);

(4) to make aprons for the workers (id.);

(5) to make knee pads for the workers (id.);

(6) to make seat pads for the chairs (R. 316); and

(7) (according to defendants' proof, which is not disputed) to replace damaged parts (R. 646).

The prosecution's uncontradicted evidence established that scrap thus utilized was not returned to the Quartermaster, and that this non-return was pursuant to the explicit directions of the Government inspectors (by contractual definition the "Contracting Officer" (R. 690)) in the Fabric plant, who had forbidden Fabric's employees to return any scrap which became soiled (R. 332, see also R. 313, 328). The prosecution offered no proof of the quantity so involved either by direct testimony of measurement or by expert opinion evidence.

The Claimed Breach of Contract

The prosecution argued that the non-return of soiled scrap was a breach of contract, and that by virtue of the

alleged breach the prosecution was entitled to rely upon the equation, since all scrap allegedly *should* under the contracts have been returned.

But even if the non-return of soiled scrap is a breach of contract, had the Government used a true equation, reflecting the yardage of wool not returned in alleged breach of the contracts, no inference of theft could have been drawn.

Moreover, it is not true that there was such a breach of contract.

The contracts provided:

> "*Unless otherwise directed* by the Contracting Officer *or otherwise provided* in the contract, the contractor shall return . . . . *in the manner* and *at the times specified* by the Contracting Officer, all surplus Property and scrap . . . .". (Emphasis supplied.) (See, e.g., para. 32(e), Gov't Exh. 19, R. 697.)

The prosecution tendered no evidence that the Contracting Officer had not otherwise directed, and the evidence it did tender, as noted above, establishes a contrary direction (R. 332). The Court of Appeals, however, held that the jury was not required to believe the Government's own testimony as to directions of the Contracting Officer* and found that there was no evidence to establish directions by the Contracting Officer not to return scrap. It held that it was defendants' burden to prove such

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* The Court of Appeals erroneously relied upon a provision which appears in only one of the four contracts requiring directions of the Contracting Officer pursuant to a clause of the contract authorizing sale of property on hand upon the completion of the contract by the contractor and the crediting of the proceeds of the sale to the contract price to be in writing. (Appendix A, p. 43; Appellee's Appendix Below, 161a)

directions on the theory that the provisions therefor were a "condition subsequent" in the contracts (Appendix A, p. 42).

The contracts, however, further provided that scrap properly *utilized* in the course of performance of the contracts was *not* required to be returned, whatever the inspector might have directed. For example, the first and second contracts provide:

> "(e) Except to the extent of any loss or destruction of or damage to Government property for which the contractor is relieved of liability under the foregoing provisions of this article, and *except for reasonable wear and tear or depreciation, or the utilization of the Government property in accordance with the provisions of this contract,* the Government property (other than property permitted to be sold) shall be returned to the Government in as good condition as when received by the contractor in connection with this contract. . . ." (Emphasis supplied.) (Appellants' Supplemental Appendix Below, 16a-17a.)

and the third contract provides:

> "(f) Unless otherwise provided in this contract, the Contractor, upon delivery to it of any Government-Furnished Property, assumes the risk of, and shall be responsible for, any loss thereof or damage thereto *except for reasonable wear and tear and except to the extent that such property is consumed in the performance of this contract.*" (Emphasis supplied.) (Appellee's Appendix Below, 160a.)

(The terms of the fourth contract were not offered in evidence by the Government.)

Not only was property "consumed" not required to be returned: consumption of clippings for miscellaneous uses was required by the contracts. For, they defined clippings as "Residue from cutting operations not large enough to be recut into smaller component parts" (Appellee's Appendix Below, 157a). They required the use of such clippings—which by definition cannot be used in the garment—"in accordance with the best commercial standards and practices * * * to the fullest extent possible" (id.). The *prosecution's* evidence established that "best commercial standards and practices" required the use of clippings for the various purposes described above (R. 315, 328).

The Motion for a New Trial

Not only did the prosecution prove the fact of these miscellaneous uses, while failing to prove or to allow in its equation the amount of wool thus consumed; it later developed the prosecution had other leads to dispositions of scrap in which petitioners had not participated. For, following their convictions, petitioners for the first time (R. 801, 802, 846) learned that certain of Fabric's employees had made a practice of collecting scrap which had fallen upon the floor, and of selling it (R. 786-88). They further learned—and the prosecutor conceded—that this fact had been disclosed to the Government prior to trial (R. 860, 874). Nevertheless, the prosecutor neither disclosed this disposition of scrap, nor attempted to prove, in the equation, the amount of scrap thus accounted for.

Defendants followed the lead which this information afforded them and established, on the basis of the same

kind of theoretical computations which the prosecution had relied upon at the trial, that during the period covered by the first two Government contracts approximately 30,000 yards of wool scrap had been sold or thrown out by Fabric employees (R. 794-96, 799, 804-811). The Trial Court's denial of a motion for a new trial on the basis of these facts was affirmed by the Court of Appeals.

The Trial Court's Refusal to Permit Defendants to Examine a Government Witness' Pretrial Statement to a Government Agent

The principal Government witness concerning the paper test was one Joel R. Strykower. On his cross-examination he testified that he had not signed a written memorandum or written report concerning the results of the test which he had conducted (R. 395). On re-direct, the prosecutor, in order to rehabilitate the witness, asked whether the witness had executed *an affidavit* at the completion of the test, and the witness testified he had (R. 405).

It then developed that he had executed at least two affidavits (R. 407), but the Trial Court, having examined them, made only one of them available to defense counsel, stating that he was withholding the other on the ground that "The other one does not relate to the testimony of this witness as far as I can tell" (R. 407).

QUESTION I

As in the net worth tax cases, the prosecution here relied upon proof of an accounting; it did not comply with the rules set forth in *Holland* v. *United States*, 348 U. S. 121 (1954); the *Holland* rules were applicable and require reversal.

The Court of Appeals failed to find the *Holland* rules applicable in this case on the ground that the net worth tax cases apply only when a defendant is dealing with his own property, whereas here defendants were dealing with Government property. The distinction is, as we shall demonstrate, totally untenable. Indeed, the very weakness of this purported distinction fortifies the conclusion that the net worth rules were applicable and were violated.

In recent years, the Courts have seen an increasing use of the accounting device in criminal cases. Prosecutors, attracted by the logic and ease of proof implicit in civil accounting actions, have sought to adapt and use the same method of proof in criminal cases, particularly tax evasion cases. This has resulted in alterations in the traditional methods of proof in an accounting, which are required by the use of the device in this new context.

In an accounting in a civil case, a defendant is charged with a stated amount of property under circumstances where he is under a legal or equitable obligation to conserve it or utilize it in a particular manner.

At that point in civil cases the burden of proof shifts, and the defendant must come forward to show the manner in which he has expended that with which he is charged. The obligation to prove these credit items is upon defen-

dant, in part because he knows better than anyone else what he has done with the property, and in part because the circumstances are such that he is under an equitable obligation to justify his conduct.

When the accounting device is transplanted to criminal cases, different rules apply. For, the burden of proof remains upon the prosecution, and that burden of proof is far stricter than in civil cases.

The principal area in which this accounting device has been transplanted to criminal cases is in the net worth tax cases. There, the accounting is as follows: a defendant is charged with increases in net worth plus non-deductible personal expenditures; he is credited with reported taxable income and non-taxable income; and the difference, if any, is unaccounted-for income which is, presumably, taxable.

Because of the differences between burdens of proof in civil and criminal cases, and because of the absence of any equitable requirement that the defendant in a criminal case prove the credit items, the use of the accounting device in net worth cases has required careful judicial supervision, lest, by indirection, the prosecution avoid its burden of proof and shift it to defendant.

These considerations led this Court, in *Holland* v. *U. S.*, 348 U. S. 121 (1954), and related cases, to lay down rules governing the use of the accounting device in criminal cases, including the duty to negate all leads to additional credit items such as non-taxable income, and the duty to negate other leads which, if true, would establish the defendant's innocence. This Court emphasized that care must be taken lest the prosecution shift its burden of proof to the defendant. No such care was taken here, and it is conceded that none of the *Holland* rules was complied with.

The essential identity between the case at bar and the net worth tax cases is apparent.

Thus, one of the considerations noted by the Court in the *Holland* case was that non-taxable income such as "gifts, inheritances, loans and the like [may] account for the newly acquired wealth . . . " (348 U. S. at 127). The Court held that the existence of credit items such as these, as to which the prosecution is furnished leads, must be negated by the prosecution.

Similarly, in the case at bar, there were leads to credit items which were not included in the accounting, such as the use of wool to clean and oil machines, to test machines, to make aprons, knee pads, seat pads, to replace damaged parts, to tie up bundles of cut parts and so on. And the motion for a new trial establishes that the prosecution had other leads to the disposition of scrap—sales of scrap by Fabric employees—acts not attributable either to Fabric or to Abrams and of which they were ignorant, which the prosecution neither proved as part of its accounting nor disclosed.

Thus, another consideration noted by the Court in the *Holland* case was the "great danger" that the jury may assume that the crime charged follows automatically from the accounting computation, which "increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." (348 U. S. at 127-28).

Similarly, in the case at bar, the jury, without guarding instructions, was allowed to take into the jury room the

various charts summarizing the computations. If there was danger from the use of such charts in *Holland*, it was equally present here.

Thus, another consideration noted by the Court in the *Holland* case was that, if the taxpayer were " . . . compelled to come forward with evidence, he might risk lending support to the Government's case by showing loose business methods . . . " (348 U. S. at 128).

The same danger is present here: the evidence relied upon by defendants to show non-criminal dispositions of scrap in the miscellaneous uses described above were seized upon by the Government as lending support to its case on the ground that they were breaches of contract. And, certainly, if defendants had known that Fabric's employees were stealing and selling scrap, as demonstrated on the motion for a new trial, and if they had called the employees involved, they would have lent support to the Government's case by showing at least "loose business methods".

Thus, another consideration noted by the Court in the *Holland* case was that such a rule would " . . . tend to shift the burden of proof . . . " (348 U. S. at 128).

Similarly, here, the prosecution in fact did shift its burden of proof by keeping silent concerning these dispositions, and by leaving it to defendants to establish the amount of wool thus consumed, if they could!

Thus, another consideration noted by the Court in the *Holland* case was that the prosecution often relies upon statements made by the taxpayer in the course of an investigation and that such statements are frequently the result of a desire for a "quick settlement" rather than "an honest search for the truth" (348 U. S. at 128).

Similarly, in the case at bar, the Government relied upon the alleged area of clippings returned by Fabric to the Government in proving the net worth computation. At the time, however, that those clippings were returned, it is obvious that both Fabric *and* the Government were more concerned with speed in manufacture and what may be called a "quick settlement" as to scrap than with a detailed search for every last scrap of wool clipping or sweeping to be found in Fabric's premises.

Thus, another consideration noted by the Court in the *Holland* case was the danger that the prosecution might pick and choose from the taxpayer's statements, relying upon the favorable ones and throwing aside those which do not "bolster its position" (348 U. S. at 128-29).

Similarly, in the case at bar, the prosecution picked and chose from Fabric's statements. Fabric not only returned scrap but filed detailed cutting records which showed that every single bolt of cloth was cut up and consumed by the cutters (see *e.g.*, R. 702). These the prosecution "threw aside" because they obviously did not "bolster its position".

The dangers incident to the use of the accounting device without regard to the *Holland* rules are emphasized in the case at bar by analysis of the prosecution's accounting chart.

That chart sets forth what purports to be a summary of the account. But the premise of the chart is itself an invalid equation which was never established by any evidence as having any validity at all. That equation—(1) area of wool delivered to Fabric minus [(2) area of wool in jackets plus (3) area of scrap returned to the Govern-

ment] equals (4) wool unaccounted for *and* not returned—conveniently omits any allowance for wool consumed in miscellaneous uses and not returned to the Government and for the scrap which was stolen by Fabric's employees. It thus falsely asserts that wool not returned equals wool unaccounted for.

In the net worth tax cases at least the equation relied upon is a true equation. Certainly, if in a tax evasion prosecution the prosecution proved the amount of income reported by a defendant on his initial tax return, but insisted upon disregarding the income reported on an amended return, which the prosecution proved was later filed, it could not be suggested that the prosecution had made out a *prima facie* case. And yet that is, by analogy, exactly what happened in the case at bar.

Conceivably, if there had been any evidence concerning the validity of the equation, the jury verdict might be deemed to have foreclosed any issue concerning it. But there was no such evidence. Indeed, the only affirmation of the validity of the equation is to be found in the prosecutor's opening, where he asserted that the equation "will show that there is this shortage . . . which Fabric Garment Company did not account for to the Quartermaster Corps" (R. 40-42).

The false premise thus conveyed to the jury at the very outset of the trial was repeatedly reaffirmed throughout the trial and was the premise for the jury's conclusion of guilt. Despite the evidence that scrap was applied to normal uses and not returned to the Government, despite the fact that it is really silly to suggest that a sane manufacturer of a half-million uniforms in a high-speed, as-

sembly line factory operation could possibly be expected by any sane Government, which needed uniforms in a hurry, to save and return every thread of scrap, and despite the prosecution's undisclosed knowledge that employees of Fabric were secretly selling scrap generated in the course of manufacture of the jackets, the prosecution, with the Trial Court's approval, put before the jury its impressive looking chart, and the jury was permitted to find guilt on the basis of the equation there set forth which is, in the light of the prosecution's evidence, false.

We submit that this case is a classic demonstration of the dangers to a defendant's rights which led to the *Holland* rules.

The Court of Appeals did not dispute the essential identity between this case and the net worth cases. It held, however, that the net worth rules did not apply because here defendants were dealing with Government property which they were under a contractual duty to return to the Government (Appendix A, p. 42).

This alleged distinction, however, if applied to the net worth tax cases, would subject the use of the method of proof in tax cases to the very abuses which led this Court to take jurisdiction in the *Holland* case. For a taxpayer is under a *statutory* duty, enforceable by penal sanctions, to pay to the Government the income tax due; certainly this duty is of greater stature than a mere contractual duty to return property.

In addition, the Court of Appeals' alleged distinction would render *Holland* inapplicable even to tax evasion cases where the defendant was charged with criminal responsibility for alleged tax evasion by a corporation of which he

was President, for there, too, he would not be dealing with his own property but with the property of another.

Accordingly, in our view, the Court of Appeals has decided a Federal question in a way which conflicts with applicable decisions of this Court.

In the alternative, if the *Holland* decision is construed as being limited to the use of the accounting device in tax evasion prosecutions, then the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

In either event, in sanctioning the incomplete accounting as a basis for conviction, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The possible impact of this departure will pervade the entire administration of the Federal criminal law. For, under the decision of the Court of Appeals, incomplete accountings might be utilized to establish guilt in prosecutions for violation of Title 18, U. S. Code §153 (Embezzlement by Trustee, Receiver or Officer), 18 U. S. Code §641 (Embezzlement of Public Money), 18 U. S. Code §648 (Misuse of Public Funds), 18 U. S. Code §653 (Misusing Public Funds by a Disbursing Officer), 18 U. S. Code §656 (Embezzlement of Bank Officer or Employee), 18 U. S. Code §1711 (Misappropriation of Postal Funds), and the like, as well as false statement prosecutions under §1001.

Finally, as noted above, the use of the accounting device in criminal cases is becoming an ever-increasing phenomenon. As noted by this Court in the *Holland* case,

the net worth system was designed as a "last resort" in criminal tax evasion prosecutions and has now become the "first volley". It is, we submit, of great importance that appropriate protection to criminal defendants be afforded at this juncture before further abuses are permitted as the Government seeks to apply the accounting device to more and more criminal cases.

QUESTION II

The rules of the *Jencks* case were violated in the case at bar.

In the case at bar, the Trial Court limited the right of defendants to inspect statements given to a Government agent by the principal Government witness to those statements which, after an *in camera* inspection, the Court found related to the witness' testimony.*

This procedure, under which relevant documents were withheld from the defense, is directly contrary to this Court's decision in *Jencks* v. *United States*, 353 U. S. 657 (1957), where it held:

> "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activi-

* There is no doubt that the withheld document touched upon the ". . . events and activities as to which" Strykower testified at the trial (*Jencks* v. *United States*, *supra*, 353 U. S. at 668), whether or not the Trial Court was correct in its *in camera* determination that the document did not relate to his actual testimony. The document was in Strykower's file, and the file was one prepared for use in this case.

ties as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." (353 U. S. 668-69)

After the *Jencks* decision and after the trial below, §3500, 18 U. S. Code was enacted. Although the statute purports to reflect the rule of the *Jencks* case, it authorizes the Judge to make an *in camera* determination of the kind made by the Court below. But the statute cannot be relied upon by the Government to support any claim that the question presented is moot.

For such a contention would require a determination that the statute was constitutionally valid. In our view, such a determination could not be made in light of the *Jencks* decision, disapproving such *in camera* inspection and determination. For the opinion in *Jencks* states that a defendant is entitled to the right of inspection which the Trial Court denied defendants below, not as a matter of procedure, but as a matter of due process. This Court said: "Justice requires no less." (353 U. S. at 669). If this is so, the statute is invalid and cannot be relied upon to deprive defendants of that which "justice requires" on any theory.

Moreover, the statute was not intended to deprive defendants of constitutional rights. Its legislative history is clear that it ". . . is not designed to nullify, or to curb,

or to limit the decision of the Supreme Court insofar as due process is concerned." (U. S. Code, Congressional and Administrative News, 85th Cong., 1st Sess., 1957, p. 1862.)

In our view, the decision of the Court below conflicts with the decision of this Court in the *Jencks* case, and calls for the exercise by this Court of its power of supervision.

QUESTION III

The denial to defendants of the right to cross-examine concerning a novel measuring device never before used in a court of law is a denial of due process.

The convictions on all ten counts of the two indictments cannot be sustained without establishing the proposition which the prosecutor asserted, but never proved by a witness who could be cross-examined: that the area of wool contained in almost one-half million Eisenhower jackets, manufactured in a high-speed factory operation, is established by extrapolating the area of 30 different sets of paper patterns produced in a fastidious laboratory operation 15,160.5 times, so as to equal the total number of jackets produced—454,814.

This denial of the right to cross-examination was justified by the Court of Appeals on the ground that the defendants were forewarned of the mechanics which would be followed on the test and they offered no evidence to dispute its validity (Appendix A, p. 38). Such a warning can not, however, shift the burden of proof; nor can it dispense with proof. It is noteworthy that the defendants were not forewarned that no expert would testify to the translation, and that when the translation was made ob-

jection was made on the ground that there was no evidence to support it (R. 540-42).

Again, the weakness of such a justification in a criminal case, in which the burden of proof remains on the prosecution, points up the violation of due process which was approved by the Court of Appeals.

For, while there is obviously a relationship between the area of paper and the area of wool cut from the same pattern, also obviously, there is inevitably a margin of disparity.

Some notion of the disparity and unreliability of the test is established by the record in this case. After direct testimony was offered to show a "shortage" of some 60,000 yards, examination of the patterns showed minuscule variations between those used in the laboratory experiment and those purportedly sent to Fabric (R. 387-390). These minuscule variations were as small as 1/8 to 3/8 of an inch on five out of twenty-five pieces of one pattern (R. 387-390). The trial was adjourned, new tests were run, and the Quartermaster employee returned to the stand to testify to a new experiment which ultimately purported to show a "shortage" not of over 60,000 yards but of 46,451 yards, a reduction of 25% (R. 576-77).

Since the claimed discrepancy in this case is now only 3.6 inches per uniform, the relationship between the area of wool used in mass manufacture and the area of paper used in a laboratory, constitutes a gap—a gap which should have been closed by testimony of a witness whom the defendants could have cross-examined.

The only material in the record to bridge that gap is the prosecutor's statement to the jury quoted above (p. 8).

Accordingly, no one could be cross-examined to ascertain the rational processes by which he came to sponsor the method, the experiments by which he validated it, the degree of tolerance he regarded as applicable to the result—1%, 10%, 20%, or less, or more, how much he allowed for the circumstances that the measurement was transposed from the average weight of paper to the conclusion that a stated number of linear yards of wool had been consumed, how much he allowed for wool dust (like sawdust) created in the cutting of the wool, which could not be retrieved, the extent of his familiarity with factory cutting operations in general and Fabric's cutting operation in particular, the factory experience of the Quartermaster Corps in producing its own uniforms over the past generation and how it compared with the laboratory results, the method by which the Quartermaster Corps computed its contractual allowances* in the first place and how those computations compared with the results of the laboratory experiment, and how he explained the gross discrepancy between the results of the laboratory experiment and the allowances granted in the contract by the Quartermaster.**

The impact of denying the right to cross-examine and imposing the burden of disproving the validity of such a novel measuring device upon the defendant in a criminal

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* Under the contracts, the contractor is allowed specific yardages for each size jacket. If these allowances are exceeded by the contractor, he is charged with the cost of the excess cloth utilized by him. Due performance of the contract without penalty is accomplished by remaining within the allowances (R. 692-93).

** In the case at bar, Fabric remained well within the allowances and in addition produced 4,814 jackets more than the contract amount, without exceeding the allowances, notwithstanding the alleged 6% "shortage" allegedly shown by the paper test (R. 564).

case will be substantial in this era of rapid scientific development. Every year new methods of measurement and new things to measure are developed. Since the end of World War II, radar has become an accepted method of measuring the speed of automobiles. The electron microscope has become an accepted method of measuring and viewing minuscule forms of matter. Blood tests in paternity cases have received acceptance. And the lie detector is knocking on the door.

We can anticipate an acceleration in the pace of development of such new measuring devices. In the circumstances, the decision of the Court below opens the door to abuses in Federal criminal trials which should be closed by this Court. Cf. *People* v. *Magri*, 3 N. Y. 2d 562 (1958), where the Court of Appeals of the State of New York held that only where a measuring device has acquired general acceptance can such testimony be dispensed with.

Accordingly, in our view, the Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court; and it has so far departed from the accepted and usual course of judicial proceedings in criminal cases, where the burden of proof is upon the prosecution as to every essential element of its case, as to call for an exercise of this Court's power of supervision.

CONCLUSION

If the Government is right in this case, every manufacturer of uniforms for the Government is guilty of filing false statements in violation of § 1001, 18 U. S. C. The

combination of an untested, unverified paper test, a false equation and an incomplete accounting gives the Government the option to convict any one or every one of the thousands of uniform manufacturers in this country.

And the option may, as here, be exercised years after the emergency giving rise to the need for the uniforms has passed, and years after the Government has accepted delivery, made payment and approved the manufacturer's performance.

Such an option, resting on such foundations, should be revoked by this Court.

Respectfully submitted,

SIMON H. RIFKIND
Attorney for Petitioners

Dated: February 26, 1959.

EDWARD N. COSTIKYAN
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Of Counsel

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 288-289—October Term, 1957.

(Argued June 12, 1958 Decided December 30, 1958.)

Docket Nos. 24732-24733

UNITED STATES OF AMERICA,

Appellee,

—v.—

FABRIC GARMENT CO., INC., JOSEPH ABRAMS, and HAROLD HYMAN,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FABRIC GARMENT CO., INC., MAYFLOWER MANUFACTURING CORP., JOSEPH ABRAMS, HAROLD HYMAN, and MURRAY BERMAN,

Defendants-Appellants,

—and—

ALERT TRADING CORP., and DAVID Q. HARTMAN,

Defendants.

Before:

HINCKS and WATERMAN, *Circuit Judges*, and RYAN, *District Judge.*

Appendix A—Opinion of Court of Appeals

Appeals from judgments and orders of the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*.

Fabric Garment Co., Inc., Joseph Abrams, Harold Hyman, Mayflower Manufacturing Corp., and Murray Berman appeal from their convictions on an indictment charging unlawful sales of Government-owned wool being made into Army jackets, in violation of 18 U. S. C. §641, and conspiracy in violation of 18 U. S. C. §371 to violate 18 U. S. C. §1001. Fabric Garment Co., Abrams and Hyman also appeal from their convictions on a companion indictment charging the making of false statements in violation of 18 U. S. C. §1001. All appellants appeal from orders denying their respective motions for new trials. As to the appellant Hyman, the convictions under both indictments are reversed and the case remanded with a direction to dismiss. As to all other appellants the convictions are affirmed except that as to Fabric Garment Co. and Abrams the convictions on Counts VI and VIII of Indictment 144-185 are reversed and remanded for new trial.

Simon H. Rifkind, of Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y. (Paul, Weiss, Rifkind, Wharton & Garrison, Edward N. Costikyan, and Frederick S. Wyle, New York, N. Y., on the brief), *for Fabric Garment Co., Inc.; and Joseph Abrams.*

Milton C. Weisman and Cecilia H. Goetz, both of Weisman, Celler, Allan, Spett & Sheinberg, New York, N. Y. (Weisman, Celler, Allan, Spett & Sheinberg, and Ralph J.

Schwarz, Jr., New York, N. Y., on the brief), *for Mayflower Manufacturing Corp., Murray Berman and Harold Hyman.*

ALAN W. RICHENAKER and ROBERT B. FISKE, JR., Asst. U. S. Attorneys for the Southern District of New York, New York, N. Y. (Paul W. Williams, U. S. Attorney, and Charles H. Miller, Asst. U. S. Attorney, S. D. N. Y., New York, N. Y., on the brief), *for the United States.*

HINCKS, *Circuit Judge*:

This appeal grows out of two indictments which were consolidated for purposes of trial and appeal. One had been returned against Abrams, Hyman and Fabric Garment Co., Inc., plus Mayflower Manufacturing Corp., Berman, Alert Trading Corp. and Hartman, charging (1) the unlawful sale of approximately 19,000 yards of Government-owned wool serge, in violation of 18 U. S. C. §641, and (2) a conspiracy to defraud the United States and to violate 18 U. S. C. §1001.* The other indictment charged violation of 18 U. S. C. §1001, and contained eight counts charging Abrams, Hyman and Fabric Garment Co., Inc., with the making of eight separate false statements about the disposition of wool serge furnished to the Fabric Garment Co. by the New York Quartermaster Procurement Agency under four contracts to make jackets for the United States Army.** After a trial to a jury, Alert Trading Corp. and Hartman were acquitted; the other defendants

* Indictment C 144-188.

** Indictment C 144-185.

were convicted. From these convictions and from the denial of a motion for a new trial, the convicted defendants appeal.

Both indictments grew out of four successive contracts which the New York Quartermaster Procurement Agency, in 1951, entered into with the defendant Fabric Garment Company (Fabric), under which Fabric was to manufacture, in the aggregate, 450,000 Eisenhower jackets for the Army out of 18 ounce olive drab wool serge to be furnished by the Procurement Agency. The contracts provided that unless otherwise directed by the contracting officer, on the completion of each contract Fabric should return all surplus property and scrap "not returned in form of acceptable articles." It was further required by each contract that on QM Form 183 Fabric should certify that "all property furnished by the government • • • has been returned • • • in the form of finished articles, full pieces, short pieces, remnants, clippings containing wool. • • • " subject to "the penalty imposed by Section 1001 of Title 18, U. S. C. A. of the Criminal Code for so certifying falsely." And on Form 201 Fabric was to certify the amount of surplus Government furnished property "on hand" at the completion of the contract.

The Agency supplied over 709,000 yards to Fabric for the manufacture of jackets, delivering this material to Fabric's cutting room first at 473 Liberty Street, and later to Knickerbocker Ave., both of Brooklyn, where it was stored pending processing. Fabric returned 454,814 finished jackets plus 89,238 pounds of wool scrap.* The specified

* The prosecution offered credible evidence that this 89,238 lbs. of scrap was equivalent to 79,322 yards of the 56" serge which had been furnished.

Government forms, two for each contract, were certified by Fabric purportedly over the signatures of Abrams and Hyman or both at the completion of each contract. The foregoing facts were not contradicted.

The appellants now contend that the evidence was insufficient to support the verdicts. At the trial the prosecutor, to prove the charge of an illegal sale of wool, offered evidence which if accepted established the following facts. Abrams, officially the secretary of Fabric, was its "boss." Berman was the proprietor and operator of Mayflower Manufacturing Corp. (Mayflower) and a close associate and assistant of Abrams in the operation of Fabric. In January 1951, Berman rented premises for Mayflower for the storage of cloth, at 450 Liberty St., Brooklyn, a block away from Fabric's plant. In July 1951, after Fabric had received the wool serge under the first two Government contracts, Abrams told a trucker, whom he had frequently employed to carry the Government serge to and from the place it was cut, to pick up 30 pieces of goods at Mayflower and truck it to Alert. The trucker received these pieces from Berman at the Mayflower premises and in the transfer the brown paper wrapping on certain pieces was broken disclosing serge which the trucker testified as the "same" and "looked the same" as the Government serge which at Fabric's behest he frequently transferred for cutting. Other such deliveries to Alert were made in July and August, 1951, some of which were confirmed by trucking tickets. In all, some 19,000 yards were sold to Alert as was proved by Mayflower's invoices and Alert's checks.

There was uncontradicted evidence that in July and August, 1951, the checks in payment of the sales to Alert

were deposited in the Mayflower bank account; that shortly thereafter Abrams caused $15,000 to be withdrawn for his personal use by devious devices whereby a bank check on Mayflower was exchanged for the check of Abrams' personal attorney in Washington, D. C., which in turn was used to pay for Abrams' purchases of oil well leases in Illinois. Moreover, Abrams made an unsuccessful attempt to obtain from the trucker possession of the trucking tickets which evidenced the transfer of the piece goods from Mayflower to Alert. And after the Government investigation began in December, 1951, Berman fled, remained in hiding under an assumed name for several months and discontinued the payment of rent for the Mayflower premises.

There was other evidence to identify the serge sold to Alert as that furnished by the Government to Fabric. The Government investigators found in the Mayflower premises, whence the delivery to Alert had been made, a piece goods ticket which had been attached to a piece of serge furnished to Fabric under its first contract for the Eisenhower jackets. Moreover, there was evidence of a "paper test" made at the instance of the prosecution which was offered to show that the linear yardage of serge, in pieces 56" wide, which went into the finished jackets plus that of the scrap returned was 46,451 yards less than the yardage furnished for all four contracts and 30,000 less than the 425,876 yards which had been furnished on the first two contracts before the sale from Mayflower to Alert had been made. Thus according to this test, Fabric should have had on hand more surplus serge than that delivered to Alert. To be sure, the validity of the test and the accuracy of its indications were challenged by the defense and

the admission of its results is now assigned as error. We now proceed, therefore, to give the test detailed consideration.

The primary purpose of the paper test was to ascertain the square yardage of the wool serge used in the completed jackets. The scheme of the test was suggested by the method of manufacture which was as follows. From copies of the master linen-paper patterns of all sizes of the jackets provided by the Quartermaster Corps, Fabric caused working patterns to be cut on heavy paper cardboard from which thin paper "markers" were traced. These were superimposed upon "lays" of the wool serge which comprised lengths of 80-layer thickness. The serge was then cut by an electric knife along the pattern of the marker. There were twenty-five separate irregularly shaped pieces of serge in each completed jacket and the contracts called for jackets of thirty different sizes.

The prosecution's paper test followed this basic scheme. A set of the twenty-five patterns for each size jacket was reproduced in heavy paper from the master pattern. This set of patterns, after conditioning, was weighed and the weight compared with that of a square yard of the same paper similarly conditioned, thereby establishing a ratio of area to weight from which was computed the square yardage of the aggregate pieces of serge going into one jacket of each size. This figure, expressed in square yards, by simple mathematical computation was translated into linear yardage of 18 ounce wool in pieces 56" wide.

There was detailed testimony as to the manner in which the test had been carried out. Mr. Strykower, the military

apparel designer of the Philadelphia Quartermaster Depot, testified that the master patterns for Eisenhower jackets, copies of which were sent to Fabric for the performance of the contracts, were in his custody; that pursuant to instructions, he cut out in designer's pattern paper exact duplicates of the master patterns in use at the time of the Fabric contracts; and that he turned these paper parts over to Mr. Bordonaro, head of the physical testing section of the paper and paper products at the Philadelphia Depot. Mr. Bordonaro testified to the conditioning and weighing of the paper parts. And finally, Mr. Good testified to the conversion of weight into yards and to the computation of the yards of wool, which by analogy the prosecution argued had gone into the completed jackets.

Although forewarned of the method of this test, the appellants offered no witness who disputed its basic validity. They did, however, question its accuracy urging that apart from any questions as to its probative value on the issue as to the amount of serge which was returned to the Government in the form of finished jackets, the test was not admissible to prove the amount of serge which Fabric should have had on hand at the completion of the contract. This is so, they say, because there was evidence that in the manufacturing process lengths of selvage were used to tie bundles of cut parts together; that scrap serge fell from the cutting tables to the floor and was swept up and disposed of; that other scrap was used for kneepads, plugging leaky steam pipes and cleaning machines; that pieces of the serge were excised as defective; and that in fitting together the several parts of a jacket for stitching there was some trimming which resulted in clippings which were

swept up and disposed of. The prosecution, however, disputed and minimized such evidence by pointing out that no written dispensation was shown for the plain provisions of the contracts for the return of all scrap; that the contractor was not charged with the selvage; that a substantial allowance for defective pieces had been included in the amount of fabric charged against the contractor and, moreover, any piece excised as defective could and should have been returned as scrap; and that the scheme of the paper test was such that the trimmings were included in the area of serge included in the finished jackets and in that form had been duly credited to the contractor. These conflicting contentions were fairly submitted to the jury.*

We hold that the paper test was rightly admitted and submitted to the jury. The ruling lay within the discretion

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* As to this the judge charged:

"In that respect we get into this paper test. The Government claims that the records show the gross yardage sent to the contractor to Fabric Garment Co., Inc.; that the paper test shows how many yards went into these garments, and that by the weight of the scrap returned they can compute the equivalent in yardage, and they claim that when that is all done there is a shortage, I think, of about 46,000 yards.

"The defendants claim that the records as to serge show gross yards, and they have explained the deductions they think should be taken from gross yardage, as to defects and so forth. They say the paper test was an unscientific test. They say you cannot compute yardage from the weight of the scrap returned because of the unscientific manner in which that was done, and they say there has been no paper allowance for waste and sweepings.

"That is the broad outline of the controversy, and as to these charges, without suggesting that one thing is more important than another, that has been, in point of time consumed, perhaps the principal issue underlying this controversy * * *"

of the judge. *United States* v. *Ball*, 163 U. S. 662, 673. We think his discretion was wisely exercised. The problem was one for the determination of area—the aggregate area in square yards of the congeries of separate, highly irregularly-shaped serge parts that went into a jacket. The solution reached depended upon a ratio or proportion; and both factors of that proportion were expressed in the weights of designer's detail paper taken from the same roll and similarly conditioned overnight. There was a corresponding similarity in the process of manufacture: the "lays" were made and the pieces cut from rolls of serge stored in the same room under the same conditions of temperature and humidity. Thus the conditions of the test had a high degree of similarity to the process of manufacture which gave the ratio thus established substantial accuracy as a means to measure the area, in terms of yardage, of the serge going into a jacket. The test provided a method for the determination of area which would be helpful to the jury in determining how much of serge furnished was left in Fabric's hands after the jackets had been delivered. It was admissible under the rule of *Lever Bros. Co.* v. *Atlas Assur Co.*, 7 Cir., 131 F. 2d 770, which also was concerned with determination of a method of measurement. Its validity depended upon measurable quantities which gave it even more reliability than such tests as were involved in *Lobel* v. *American Airlines*, 2 Cir., 205 F. 2d 927, and other cases such as *American Tobacco Co.* v. *United States*, 6 Cir., 147 F. 2d 93, 119, aff'd 328 U. S. 781, and *Gaillard* v. *Boynton*, 1 Cir., 70 F. 2d 552. And we find no error in the receipt in evidence of Government Exhibit 177 which was a compilation of the evidence basic to the pros-

ecution's calculations of the amount of serge furnished which was not returned. *United States* v. *Schenck*, 2 Cir., 126 F. 2d 702, cert. denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705; *United States* v. *Samuel Dunkel Co.*, 2 Cir., 184 F. 2d 894, 898, cert. denied 340 U. S. 930; *United States* v. *O'Connor*, 2 Cir., 237 F. 2d 466. And see *United States* v. *Johnson*, 319 U. S. 503, 519; *Kemler* v. *United States*, 1 Cir., 133 F. 2d 235, 240; IV Wigmore on Evidence, 3d Ed., §1230.

We do not overlook the appellants' interesting and ingenious argument that resort by the Government to the paper test necessarily brought into play the principles of the net worth tax evasion cases. Claim is made that the prosecution failed to comply with the safeguards laid down for such prosecutions in *Holland* v. *United States*, 348 U. S. 121. The theory is that here, as in a net worth tax evasion case, the prosecution's case depends on an accounting as to which the burden is on the prosecution to prove all credits to which the defendants are entitled as well as the debit items charged against them. And so they contend that the burden was on the Government to prove the amount of wool which permissibly (as they assert) went into scrap and was never returned or accounted for. We see, however, no valid analogy with net worth cases.* For in such

* Naturally, the information of the prosecution in a net worth case as to the existence and amount of assets includable in a defendant's opening net worth statement lacks both the specificity and the authenticity of the prosecution's information as to the amount of Government wool which was actually entrusted to a contractor for manufacture. Moreover, under the net worth theory the Government's case depends upon an opening net worth statement which generally goes back to a time long before the taxpayer was on notice of any need to keep an

cases the problem relates to the inferences which may be drawn from changes in a defendant's net worth resulting from dealings *with his own property* to which, of course, the Government had neither title nor right to possession. Here the problem relates not to appellants' property but *to property of the Government*, title to which, under an express provision of the contract, remained in the Government throughout the manufacturing process and which appellants were under a contractual duty to return in the form of finished articles or scrap.

The appellants make much of the contract provision whereby the duty to return remains in force "unless otherwise directed by the Contracting Officer." But we agree with counsel for the Government that the contractual condition just quoted relative to a contrary direction by the Contracting Officer was one by way of condition subsequent. Consequently, if the appellants relied upon the condition, it was for them to come forward with some evidence that the Contracting Officer had indeed "otherwise directed." *Javierre* v. *Central Altagracia*, 217 U. S. 502; *Davies Flying Service* v. *United States*, 216 F. 2d 104. See also *McKelvey* v. *United States*, 260 U. S. 353; *United States* v. *Krepper*, 3 Cir., 159 F. 2d 958, cert. denied 330 U. S. 824. Of such evidence there was none. It is true that the appellants point hopefully to the testimony of one of Fabric's employees who when called by the Government reported the Government inspector assigned to these con-

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accurate tabulation of his assets. In the instant case, however, the contractor was on notice from the time the contract was signed that he would be required to certify, under pain of the penalty imposed by §1001, the amount of serge not returned to the Government at the completion of the contract.

tracts as saying that "any clippings • • • that would fall off the table and hit the floor, you are not allowed to send back to the Government." But it is scarcely sensible to construe the quoted statement as conclusively establishing an exception authorized *by the Contracting Officer* to the contractual provision calling for the return of all scrap, especially in view of a contractual provision that "[D]irections of the Contracting Officer and communications of the contractor issued pursuant to this clause shall be in writing." Certainly the jury was not required to accept this testimony as sufficient to establish an authorized disposition of the scrap otherwise than by return to the Government. At most, it created a factual issue which the jury by its verdict resolved against the defendants. We see no occasion here for application of the *Holland* rules.

At trial another line of defense to the charge of an unlawful sale was advanced. The appellants called witnesses who testified in some detail that Abrams in 1946 had bought some 20,000 yards of 18 ounce olive drab wool serge at $2.75 per yard which a friend had stored for him without charge for some four years. Despite the size of this alleged transaction, there was no documentary evidence either of its consummation, of the carrying charges throughout the subsequent years such as insurance, or of inventory reports. Abrams' friend testified that in the middle, or possibly the spring, of 1951 [which was after Fabric had received the Government serge on the first two contracts], he delivered this serge in numerous successive shipments as requested by Abrams, to Mayflower.

It seems to us beyond argument that there was ample proof of a sale to Alert in July and August 1951 of some 19,000 yards of serge made nominally in Mayflower's name but actually at the instance of Abrams with the active assistance of Berman. Not so strong, perhaps, was the proof that the subject-matter of the sale was Government-owned serge. But on this issue also, which lies at the heart of the controversy, we are satisfied that, except as to Hyman, the totality of the evidence adequately supports the verdict. *United States* v. *Pugliese*, 2 Cir., 153 F. 2d 497. Certainly it lay within the province of the jury to reject as incredible the defense testimony of a personal investment in wool serge by Abrams which he had carried until its sale to Alert five years later. The jury may well have considered this shallow explanation entirely false and fabricated and as indicative of a consciousness of guilt on the part of Abrams and Berman. *United States* v. *Von Clemm*, 2 Cir., 136 F. 2d 968, cert. denied 320 U. S. 769; *Di Carlo* v. *United States*, 2 Cir., 6 F. 2d 364, cert. denied 268 U. S. 706; *Hodgskin* v. *United States*, 2 Cir., 279 F. 85, 93. Especially telling was the devious method used by Abrams to siphon $15,000 out of Mayflower's treasury after Alert had paid Mayflower for its purchase of serge. The verdict did not rest on hearsay declarations made by Hartman, of the Alert Trading Co., as appellants suggest. Documentary evidence was received which showed that payments by Alert of charges on Mayflower invoices were covered into the Mayflower bank account from which Abrams' circuitous withdrawals were fully proved by competent evidence.

The appellants further claim that because the jury ultimately acquitted Hartman of conspiracy with the appel-

lants, Hartman's acts and declarations, as testified to by Government witnesses Cooper and Agent Mulderig, were inadmissible against the appellants. The law, however, is otherwise. There was evidence in the record relating to Hartman's relationship to the appellants which justified the admission of this testimony. *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201, 230-1, aff'd 341 U. S. 494; *United States* v. *Puglisi, supra*; *Kamanosuke Yuge* v. *United States*, 9 Cir., 127 F. 2d 683, cert. denied *sub nom. Mateus* v. *United States*, 317 U. S. 648. Of course it does not follow that the evidence of Hartman's declarations because it was properly admitted might be used against other defendants absent a finding that Hartman was a co-conspirator or a partner in a common criminal enterprise. But there is nothing to show that the jury gave the evidence improper application. At the time this testimony was received, the jury was properly cautioned as to the effect of the declaration. And there was no request for a repetition of this caution in the charge.

As to Hyman, however, a different result is required. It is true that he was titular president of Fabric and a signature purportedly his appears on some of the contracts and the government forms. There was vague testimony that his position in Fabric was that, roughly, of factory superintendent. But there was no direct evidence that he knowingly assisted in the sale of Government wool to Alert or participated in the proceeds and no evidence of his activities from which such participation should be inferred. As to him there was no evidence of consciousness of guilt. For lack of evidence, we hold that his conviction should be set aside and that the charges pending against him under both indictments be dismissed.

We will now assess the sufficiency of the evidence to support the eight counts of the companion indictment charging the making of false statements in violation of 18 U. S. C. §1001. The verdicts on these eight counts necessarily import findings that the defendants Fabrio, Abrams and Hyman knowingly made, or caused to be made, two false certificates with respect to each of the four contracts. As to Hyman, these findings are unsupported by evidence sufficient to establish his knowledge of their falsity. We therefore shall focus our scrutiny on the evidence against Fabric and Abrams.

It is urged in behalf of Abrams that as to the four certificates which the Government alleges bear his signature (those charged in Counts I, II, III and VII of the indictment) there was no evidence which authenticated his signature as genuine. It is true that there was no direct authenticating testimony. However, in addition to these certificates there were in evidence several other documents which were alleged to bear Abrams' signature. Thus the signature page of the original contract, Q.M. 12372, contained a certificate purportedly showing Abrams' signature which compared with his signature on a "Request for Signatures" which the Procurement Agency had previously sent to and received back from Fabric complete with the requested signatures. Although Abrams' signature on none of these documents had been directly identified by a qualified witness, we think it was permissible under the evidence of the dealings between the Government and Fabric and Abrams to infer the authenticity of these documents and to conclude that the Abrams' purported signatures on the certificates were indeed his. *Hupman* v. *United States*, 6 Cir., 219 F. 2d

243, 247, cert. denied 349 U. S. 953. The jury may well have thought this circumstantial evidence all the more convincing because of the fact that it stood uncontradicted by any evidence to dispute the authenticity of Abrams' signatures on the certificates.

However, to hold Abrams on these certificates it was not necessary for the Government to prove even circumstantially that the certificates each actually bore a signature made by his hand. From the many facts in evidence showing Abrams' dominance in the Fabric enterprise and his participation in the sale to Alert, the jury might reasonably have inferred that even if his signature had been placed on some of the certificates by a subordinate and even if on other certificates his signature did not appear at all, he himself had caused the certificates to be made and was criminally responsible as an accessory under 18 U. S. C. §2 for all those certificates which were proved to be false.

But Abrams and Fabric further assail the false statement convictions for lack of evidence to show that the certificates were false or known by them to be false. As to the four certificates relating to the first two contracts, this attack is clearly unfounded. The evidence which we held sufficient to sustain the finding of the illegal sale of Government-owned wool by Abrams to Alert is equally sufficient to support findings that to their knowledge all the serge furnished on the first two contracts had *not* been returned or transferred with authority, as certified, and that to their knowledge the surplus inventory had been falsely certified.

The case is not so strong as to the two "Return of Inventory" (Form 201) certificates relating to the last two

contracts: there is no evidence that any particular illegal sales had been made from material furnished under these two contracts. Nevertheless, the evidence based on the paper test showed such great disparity between the material concededly furnished and that which was returned that, if the test were accepted by the jury as it might properly have been, the jury might properly conclude that there was an unreported shortage of such substantial magnitude that Fabric and Abrams must have known that these two certificates also were false.

But as to the two "Return of Property" (Form 18) certificates covering the last two contracts we agree that there was a vital failure of proof. These two certificates recited that the property furnished had been returned "and/or transferred as authorized" by the Procurement Agency. This alternative disposition was not stated as an exception or a condition subsequent to the provision for return. To prove the certificate false, it was incumbent on the Government to prove that surplus material had neither been returned nor transferred as authorized. And we find no proof of an absence of authorized transfer. Thus although we see no valid reason to disturb the verdicts against Fabric and Abrams on Counts V and VII as well as Counts I to IV, inclusive, the convictions of Fabric and Abrams on Counts VI and VIII must be reversed and the cases remanded for new trial on said counts if the United States so elects.

The appellants also question the sufficiency of the evidence to support the conspiracy count (Count III of Indictment 144-188). As noted above, as to Hyman we agree that the evidence was insufficient. But as to the other

appellants we hold the evidence was ample. As to them, the evidence of collusion in the sale of Government-owned wool to Alert, to mention one of the numerous items of relevant proof, warranted an inference that they had agreed to cause false statements to be made in violation of 18 U. S. C. §1001. Otherwise, they could not hope to conceal their crime.

In addition to the foregoing contentions, numerous other claims of error are pressed upon us by the appellants. They charge that venue both of the false statement counts and of the conspiracy count was improperly laid in the Southern District of New York. It is unnecessary to pass on the merit of this contention. For the venue was not questioned until after the Government had completed its case. The objection therefore was waived. *United States* v. *Miller*, 2 Cir., 246 F. 2d 486, rehearing on other points denied, 248 F. 2d 163, cert. denied 355 U. S. 905; *United States* v. *Spagnuolo*, 2 Cir., 168 F. 2d 768, cert. denied 335 U. S. 824; *Hagner* v. *United States*, D. C. Cir., 54 F. 2d 446, aff'd 285 U. S. 427. But even if the objection to venue had not been waived, we should sustain the venue. The overt acts alleged in the conspiracy count were the filings, in the Southern District of New York, of the false statements with respect to the four Government contracts. The proofs showed that these statements were to be submitted to the "Contracting Officer" whose office was with the New York Procurement Agency at 111 E. 16th, New York City, in the Southern District of New York, and that the completed forms were found there in the files of that agency. This was enough to sustain the challenged venue in the Southern District. *DeRosier* v. *United States*, 5 Cir., 218 F. 2d 420,

cert. denied 349 U. S. 921, and *United States* v. *Miller, supra*. Even if the completed forms had been dispatched from Brooklyn, the crimes charged were completed when the statements became a part of the Agency files in Manhattan. Cf. *United States* v. *Miller, supra*.

After passing a few scattered claims of error which we find without substance and overrule without discussion, we now come to the appellants' vigorous assertion of error in denying their motion for new trial. The motion was based in part on evidence allegedly newly discovered and in part on a cognate contention that the newly discovered evidence had been improperly suppressed by the prosecution.

The evidence derived from one Oliveri, an employee of Fabric, who stated that throughout the performance of the contracts he with the help of fellow employees had daily sold an undefined amount of wool scrap to junk dealers, and that he had not revealed this practice to the appellants until after their conviction. However, although the appellants had been forewarned of the trend of the Government's proofs, their motion was supported by no showing that the appellants, by seasonable inquiries of Oliveri and the other employees, could not have learned of this disposition of the wool scrap before trial.

The claim of wrongful suppression rested upon the conceded fact that prior to trial Oliveri in an interview with the prosecuting attorney and an FBI agent informed them that in the course of the performance of the contracts he had been selling scrap. But the motion papers also revealed that Oliveri had been interviewed by defense counsel.

the day before and the day after his interview with the prosecuting attorney. At one of these interviews, according to the affidavits in support of the motion, defense counsel ascertained that Oliveri had a criminal record and on that account decided not to call him as a witness. But, according to the supporting affidavits, the appellants never knew that Oliveri had information helpful to the defense. Why the defense should have rejected Oliveri as a witness because of his prior record before knowing whether he had helpful evidence, is unexplained. However that may be, under all the circumstances appearing of record we think it would be fantastic to sustain a charge of an improper suppression upon the failure of the prosecution either to sponsor a witness whom the defence had rejected as lacking in credibility, or to inform the appellants of information derived from their own employee who was in immediate contact with appellants' counsel. The charge of suppression is reminiscent of a tactic as old as the art of warfare which recognizes that there are times of adversity when a vigorous offense is the best defense available.

We affirm the denial of a new trial on Judge Walsh's penetrating (unreported) opinion the vitality of which, in our judgment, is unimpaired by the appellants' assault. The ruling is in accord with authoritative precedent. *Nardone* v. *United States*, 308 U. S. 338, 342. See also *United States* v. *Costello*, 2 Cir., 255 F. 2d 876, cert. denied 357 U. S. 937, reh. denied November 24, 1958. Moreover, "it does not clearly appear that the findings are not supported by any evidence." It follows that we may not intervene. *United States* v. *Johnson*, 327 U. S. 106, 112.

As to the appellant Hyman, the convictions under both indictments are reversed and the case remanded with a direction to dismiss. As to all other appellants the convictions are affirmed except that as to Fabric Garment Company and Abrams the convictions on Counts VI and VIII of Indictment 144-185 are reversed and remanded for new trial.

APPENDIX B

Judgments of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of December one thousand nine hundred and fifty-eight.

Present:

HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges.
HON. SYLVESTER J. RYAN,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FABRIC GARMENT CO., INC.,
JOSEPH ABRAMS and HAROLD HYMAN,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed except that as to appellant, Harold Hyman, the judgment is reversed and the action be and it hereby is remanded with a direction to dismiss and except that as to appellants, Fabric Garment Co., Inc. and Joseph Abrams, the judgment as to counts VI and VIII of the indictment (144-185) be and it hereby is reversed and the action be and it hereby is remanded for a new trial in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

Appendix B—Judgments of Court of Appeals
(Companion Appeal)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of December one thousand nine hundred and fifty-eight.

Present:

HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges.
HON. SYLVESTER J. RYAN,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FABRIC GARMENT CO., INC., MAYFLOWER MANUFACTURING CORP., JOSEPH ABRAMS, HAROLD HYMAN, MURRAY BERMAN,

Defendants-Appellants,

and

ALERT TRADING CORP. and DAVID Q. HARTMAN,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgments of Court of Appeals
(Companion Appeal)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed except that as to appellant, Harold Hyman, the judgment is reversed and the action be and it hereby is remanded with the direction to dismiss in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

APPENDIX C

Statutes Involved

1. The Act of June 25, 1948, c. 645, 62 Stat. 725, 18 U. S. C. 641, as codified, reads as follows:

"§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

2. The Act of June 25, 1948, c. 645, 62 Stat. 749, 18 U. S. C. 1001 as codified, read as follows:

"§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States

knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

APPENDIX D

Government's Exhibit 177

CALCULATION OF "SHORTAGE"

	QM 8944	QM 12372	QM 21996	QM 22965	Total
rge furnished by M to Fabric Garment Inc. in yards wide	74,133	351,743	243,847	39,466	709,159
nished jackets livered to QM	50,000	229,500	151,264	24,050	454,814
rds of Serge 56" de for jackets	61,150	285,856	203,168	33,212	583,386
ppings of Serge turned to QM in rds 56" wide	8,009	40,068	26,565	4,680	79,322
rge unaccounted and not returned QM in yards 56" de	4,974	25,819	14,084	1,574	46,451

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APR 30 1959
JAMES R. BROWNING, Clerk

Nos. 732-733

In the Supreme Court of the United States

OCTOBER TERM, 1958

MURRAY BERMAN AND MAYFLOWER MANUFACTURING CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

FABRIC GARMENT CO. INC., AND JOSEPH ABRAMS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 732

MURRAY BERMAN AND MAYFLOWER MANUFACTURING CORP., PETITIONERS

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No. 733

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 262 F. 2d 631. The opinion of the district court deny-

ing the motion for a new trial (R. 916–922)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1958 (SR. 39a). On January 20, 1959, Mr. Justice Harlan extended the time within which to file the petitions for writs of certiorari to and including February 28, 1959. The petitions were filed on February 27, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the convictions were supported by substantial evidence.

2. Whether the trial court abused its discretion in denying a motion for new trial.

3. Whether the trial court erred in withholding from the defense a pretrial affidavit made by a government witness.

4. Whether a conversation during the life of the conspiracy with a co-defendant who was acquitted was admissible, where the jurors were instructed that they must find that the co-defendant was a member of the conspiracy before they could consider his conversation as evidence against petitioners.

5. Whether the court of appeals erred in concluding that any objection to the venue of the conspiracy count

[1] The first three volumes of the record are paginated consecutively from 1 to 926, and will be referred to as "R.". Volume IV, paginated 1a to 174a, will also be referred to as "R.". Volume V, consisting of a supplemental appendix filed by petitioners in the court below and the proceedings in that court, paginated 1a to 43a, will be referred to as "SR.".

had been waived, and that venue had been proved in any event.

STATEMENT

Petitioners are the Mayflower Manufacturing Corp. (Mayflower) and its president, Berman (in No. 732), and the Fabric Garment Co., Inc. (Fabric), and its nominal secretary but actual chief officer, Abrams (in No. 733). In 1951 Fabric was furnished by the Government large quantities of olive-drab wool serge to be used by it in making "Eisenhower" jackets under contracts with the New York Quartermaster Procurement Agency. Petitioner Abrams is alleged to have misappropriated 19,000 yards of that serge and to have sold it, with the aid of petitioner Berman, to a third party. The convictions involved here are based primarily upon that alleged sale.

All four petitioners were convicted of the unauthorized sale of Government-owned property in violation of 18 U.S.C. 641. Petitioners Fabric and Abrams were also convicted of submitting false statements to the Government (in accounting for the government-furnished property under the contracts) in violation of 18 U.S.C. 1001. Finally, all four petitioners were convicted of a conspiracy to submit the false statements and to defraud the United States in violation of 18 U.S.C. 371.[2] Petitioner Abrams was sentenced to concurrent terms of thirty months' imprisonment on the sale and conspiracy counts and was given a suspended sentence on the false statement counts

[2] The sale and conspiracy counts were charged in indictment No. C 144–188 (R. 27–33); the false statement counts were charged in indictment No. C 144–185 (R. 10–15).

(R. 747–748, 755–756). Petitioner Berman was sentenced to concurrent terms of six months' imprisonment on the sale and conspiracy counts (R. 757–758). The corporate petitioners were given suspended sentences (R. 746, 751–752). The court of appeals reversed the convictions on two (of the eight) false statement counts but otherwise affirmed the judgments (SR. 20a–39a).

A. THE TRIAL PROCEEDINGS

1. It is undisputed that there was sufficient evidence to establish the following facts:

Fabric was furnished 74,133 yards of 18-ounce olive-drab wool serge under a contract (QM 8944) awarded it on January 5, 1951 (R. 129, 537–539), and 351,743 yards under a contract (QM 12372) awarded it on February 20, 1951 (R. 131, 563–564).[3] During July and August 1951, petitioner Abrams sold, through petitioner Berman,[4] 19,000 yards of olive-drab wool serge to the Alert Trading Co.[4] at a price of $3.90 per yard.[5] The serge had been delivered by Abrams to Berman in January or February 1951 and had been stored until the sale at premises at 450 Liberty Avenue, Brooklyn, New York, which Berman had rented in Mayflower's name. (R. 64–65, 71–72, 75, 84–85, 91–92, 113–115, 17a, 21a, 48a.)

[3] All yardage measurements are in linear yards of 56-inch wide material, with material furnished in other widths having been converted to 56-inch equivalents. Fractional yards have been rounded off to the nearest whole number.

[4] Alert and its president, David G. Hartmann, were also named in the indictment but were acquitted by the jury.

[5] The market price was then $4.25 per yard (R. 50, 51).

Checks received from Alert in July and August in payment for the serge were deposited in a bank account opened by Berman in Mayflower's name (R. 85). On August 17, 1951, a check for $15,000, payable to Thurman Hill, was drawn on that account and deposited by Hill in his own account in Washington, D.C. (R. 526–527, 532). Hill thereafter purchased two oil leases for petitioner Abrams at a cost of $15,000 (R. 527–531).

In December 1951, the Federal Bureau of Investigation began an investigation of a report that Alert had a large quantity of olive-drab wool serge for sale.[6] On December 22, 1951, Agent Mulderig, having learned that Alert had purchased the serge from Berman, undertook to interview Berman but found the Mayflower premises locked. Abrams, upon inquiry by the agent both then and on several occasions in January and February 1952, denied having seen Berman or knowing how to locate him. Harold Hyman, the nominal president of Fabric,[7] told the agent on February 12, 1952, however, that Berman had visited the Fabric plant about three weeks earlier (R. 63, 67–69). In fact, Berman had gone to Atlantic City, New Jersey, for the period from December 27, 1951, to January 14, 1952, registering at the Penn-

[6] The report probably came from Joseph Cooper (R. 52–53), who also testified at the trial that in December 1951 Hartmann (president of Alert) had offered to sell him 18-ounce olive-drab wool serge for $3.75 per yard (when the market price was $4.25 per yard) and had told him that he (Hartmann) had paid $2.25 per yard for the cloth (R. 46–47).

[7] Hyman was also named in the indictments, but his convictions were reversed by the court of appeals.

Atlantic Hotel under the name of David Berke (R. 98–99, 105).

In late 1951 or early 1952, Abrams attempted unsuccessfully to obtain from the trucking company which had delivered the serge to Alert the receipts showing the deliveries of the serge. They were later turned over to the F.B.I. (R. 150–152).

At the premises at 450 Liberty Avenue formerly occupied by Mayflower were found several pieces of cardboard bearing the number of Fabric's second contract and, on the second floor, a mill ticket indicating that the roll of cloth to which it had been attached had been shrunk at the Philadelphia Quartermaster Depot on January 25, 1951 (R. 75, 95, 298–299, 339–340).

2. To support the inference that the olive-drab wool serge sold by Abrams and Berman to Alert came from the Government-furnished serge then in Abrams' possession, the Government sought to show that Fabric had not accounted for all of the serge furnished to it under the contracts. Under the terms of the contracts, Fabric was required to return to the Government, in addition to the finished jackets, all remnants, scraps and clippings (R. 127–131, 690–694, 156a–168a). The number of jackets of each size delivered, and the weight of the scrap returned to the Government under each contract was undisputed. Since the material furnished by the Government was 18-ounce serge—*i.e.*, weighed 18 ounces per linear yard—the yardage equivalent of the scrap returned could be determined from its weight by a simple mathematical computation.

To determine the yardage of serge contained in each finished jacket delivered, the Government began with the area of the patterns from which each size jacket was cut. Reproductions of the original patterns made out of a special hard paper were weighed by the physical testing laboratory at the Philadelphia Quartermaster Depot and the weight compared to the weight of a square yard of the same paper. This method of measuring the area of the irregularly-shaped patterns—the so-called "paper test"—was described in detail at the trial (R. 448, 459, 485–492, 542–543, 136a–137a, 168a, Gov't. Ex. 172). William Schneider, chief cutter for Fabric, had testified that in the manufacture of the jackets under the contracts the several parts of each jacket were cut by following "markers" made from reproductions of the patterns furnished Fabric, using first-class commercial practices to conserve material in the cutting (R. 260–261, 266-273, 277, 288, 295–304). Although the main parts of the jackets were cut "exactly the same as the pattern", it was necessary, because of sewing methods used by Fabric, to cut some of the jacket trimmings, such as the patch pocket, the pocket flap, the underside of the collar, and the belt pieces "a trifle larger than the pattern" (R. 285–286). Those pieces, however, were then trimmed to specification after sewing (R. 639–642).

From the area of the patterns used (established by the paper test), the evidence that the jacket parts were cut exactly from the patterns, and the number of jackets delivered, the Government computed the

yards of serge contained in the delivered jackets. The results of this computation—and of the computation of the yards of serge represented by the returned scrap (computed from its weight)—were shown on Government Exhibit 177, reproduced at No. 732, Pet. 54. In summary, it showed that there were 4,974 yards of serge furnished by the Government under the first contract which were not accounted for by the jackets and returned scrap and 25,819 yards under the second contract, a total of 30,793 under the two contracts. Under two other contracts awarded to Fabric in December 1951 (QM 21996, R. 135–141; QM 22965, R. 142), there were similarly 14,084 and 1,574 yards, respectively, not accounted for, making a total on all four contracts of 46,451 yards.[8]

3. The defense sought to show that the serge sold to Alert was war surplus material purchased by Abrams in 1946 and that the Government-furnished serge which was not accounted for by the finished garments and returned scrap could be explained by the fact that some scraps and clippings were not returned to the Government but were used for other purposes or thrown away.

Petitioners introduced evidence that early in 1946 Abrams purchased, at a price of about $2.75 per yard,

[8] Although the last two contracts were not awarded until after the alleged sale to Alert, they are relevant because of the possibility that scrap from those contracts could have been returned as scrap from the second contract (the last load of which was not returned until after the later contracts were awarded, R. 170a, Gov. Ex. 180) in order to conceal the shortage on the second contract.

some 300 to 340 pieces of 18-ounce olive-drab wool serge, most of it war surplus goods, from a local selling agency. This cloth mildewed within three or four months because Abrams stored it under improper conditions (R. 587–589). Sam Goldman, a friend of Abrams, testified that he stored this cloth for Abrams at Goldman's plant, free of charge (R. 141a), from 1947 until the middle of 1951 (R. 596–599), when Goldman began to deliver the material to the premises occupied by Mayflower (R. 606, 615–616). Goldman testified that his son had made the deliveries over a period of several months, but he admittedly had no records or documents of any sort relating to the storage and delivery (R. 142a–143a).[9]

Government witness Schneider (Fabric's chief cutter) testified that not all the clippings were saved and returned to the Government. Some pieces were used, in accordance with commercial practice, for various incidental purposes, such as making aprons and knee pads, cleaning or testing machines, mopping up water, etc. Other pieces inevitably fell to the floor, where they were swept up and thrown away (R. 312–315, 332–334).[10] Asked whether such diversions might account for 60,000 yards, however, he replied: "Absolutely not, 60,000 yards. That is a thousand rolls" (R. 333–334).

[9] Goldman's son testified that he had delivered some goods to petitioner Abrams in the "early 50's". (R. 615).

[10] Schneider also testified that the cutters were in fact forbidden by the Government inspector to return scrap which had fallen on the floor (R. 332), but it seems immaterial to the questions in this case whether the throwing away of such scrap was authorized or unauthorized.

Julius Markman, Fabric's production foreman, also testified that some scrap was used for other purposes and that scrap falling to the floor was thrown away (R. 642–646, 149a). He further testified that in the spring of 1951 additional storage space was needed for cut parts of the jackets and that they were stored on the first floor of the Mayflower premises on Liberty Avenue. On a visit to the premises he saw a box of piece goods tickets also stored there (R. 629–632, 149a–150a).[11]

B. PROCEEDINGS ON MOTION FOR NEW TRIAL

On August 26, 1957, four months after the verdict and over a month and a half after the sentencing, petitioners moved for a new trial on the basis of newly-discovered evidence which they claimed had been suppressed by the Government—namely, that Frank Oliveri, Fabric's head shipping clerk, and several other employees had, during the performance of the contracts, segregated wool clippings from the sweepings and sold them to junk dealers for their own profit. Although Oliveri allegedly told petitioner Abrams of the practice on the day after the verdict, Abrams took no steps to investigate further or to seek a new trial until after the sentencing over two months later (R. 787–788).

1. Oliveri stated by affidavit that some time "early in 1951" (R. 824) [12] he and his assistants began sep-

[11] The Government-type mill ticket found on the premises by the F.B.I. agent (*supra*, p. 6) had been found on the second floor (R. 75).

[12] James Baker, one of Oliveri's helpers, fixed the time as after the first week in April (R. 807–808). Al Frizell, Oliveri's

arating clippings from the cutting room sweepings and selling them, making no attempt to keep the salvage operation secret (R. 823–824, 826, 846). In addition to olive-drab wool serge, the clippings included navy blue serge and melton cloth, but there was "more brown than blue" (R. 827, 834).[13] Oliveri received "maybe eight cents a pound" for the clippings (R. 852; see also R. 828), and the money was divided with his two assistants and the night watchman (R. 829).[14] Oliveri and his helpers each realized an average of about $10 a week from this activity (R. 807–808, 810, 837). They reclaimed in this way between two-thirds and three-fourths of the sweepings (R. 851). The clippings were sold first to Novak and later to Herman, but not to both at the same time (R. 831–832).

Max Novak, the junk dealer to whom Oliveri said he first sold the clippings, refused to make an affidavit or permit his cashbook to be photostated (R. 790–791), but petitioner Abrams stated in his affidavit that he and others had interviewed Novak and that Novak had admitted buying woolen rags from Oliveri at a price from six to eight cents a pound, paying Oliveri a total of $1,884.75 for six purchases during

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other helper who worked there "during the middle of 1951", said that Oliveri "suggested after I was there a while" that they start separating and selling the scrap (R. 810).

[13] In his affidavit Abrams estimated that during the time the "Eisenhower" jackets were being cut, about 75% of the wool clippings in the trash would be of olive-drab wool serge (R. 794).

[14] Beginning in October, 1951, Nat Rosen, a subcontractor who cleaned and inspected finished garments for Fabric, also received a share (R. 805–806).

February–September 1951 (R. 788–790, 799)." The second junk dealer, Simpson Herman, stated by affidavit that he bought rags from Oliveri between "the winter of 1951" and March 1952, paying Oliveri ten cents a pound and "about $1,000 in all" (R. 804).

2. Oliveri also stated that he had been interviewed before the trial by Alan W. Richenaker, one of the Assistant United States Attorneys who tried the case, and Harold Good, an F.B.I. agent, and had told them of his selling of scrap. According to Oliveri, the statement angered Good, who made such statements as: "I'm going to make out I didn't hear that answer"; "You're stealing government property"; "Who put you up to say that"; "You are going to wind up holding the bag"; and "If you go up there as a witness, we'll rip you apart" (R. 838–844).

Agent Good, by affidavit, specifically denied making the alleged statements or any other attempt to intimidate Oliveri (R. 874–875). Richenaker, by affidavit, stated that he had interviewed Oliveri on March 1, 1957, nineteen days before the trial, about Fabric's shipping practices and handling of scrap and that Oliveri had mentioned that he had sold scrap from the

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[15] The alleged purchases were recorded on Novak's cashbook as being from "Beekman Clothes, Inc.", an operating company which was a Fabric affiliate, allegedly at Oliveri's request (R. 790). The first three of the purchases (February 16, March 26, and April 13, R. 799) were before the dates fixed by Baker and Frizell as the start of the salvaging operation (see note 12, *supra*). The other three (August 1 and 15 and September 6, R. 799) were during a period in which Fabric had suspended the cutting of jackets under the contracts (August–November 1951, R. 151a).

sweepings but said that Abrams or Hyman had told him that the Government did not want dirty cloth returned (R. 858–859, 870). Richenaker understood this to mean that Oliveri had specifically asked Abrams or Hyman about selling the scrap (R. 859). He expected Oliveri to be called as a defense witness (R. 861).[18]

Affidavits filed by defense counsel, when read with Oliveri's affidavit, show that Oliveri was interviewed by them the day before his interview with Richenaker and that after the interview he went directly to defense counsel, recounted the questions asked by Richenaker, and told them that the Government did not intend to call him as a witness (R. 896–897, 907–908). Defense counsel decided not to call Oliveri as a witness because he had a record of three felony convictions (R. 846–847, 897, 908).

3. In a memorandum opinion (R. 916–922), the district court denied the motion for a new trial because the "newly-discovered evidence" either was in fact or should have been available to petitioners before trial and because there was no basis for the claim that the Government had suppressed Oliveri's testi-

[18] In September, 1957, after the Government's counter-affidavits had been filed, Oliveri made another affidavit in which he repeated most of his former allegations and added that he had told Richenaker that he had received less than five cents a pound for the scrap and that Good had told him that other employees were also selling scrap. Oliveri said that he had been frightened and worried by Good's statements and thus pressured into not disclosing his sales to defense counsel (R. 883–885). These allegations were specifically denied by Richenaker and Good in later affidavits (R. 900–901, 910–911).

mony. He noted that defense counsel had been fully aware of that line of defense—having emphasized both in their opening and closing statements and in examining witnesses that some scrap was thrown out as sweepings—and that investigation of the sweepers and junk dealers was an obvious line of inquiry. Defense counsel had in fact interviewed Oliveri at least twice and, the court said, "I cannot believe" that they failed to question him on that subject. The court concluded that the evidence was not in fact pursued and offered at the trial only because it was "dangerous and inconclusive"—dangerous because it showed that Government property was in fact diverted, and inconclusive because Oliveri's estimates were so "vague and shifting as to be worthless", while Novak's records (even if he would testify and could identify the purchases from "Beekman Clothes" as being from Oliveri) did not correspond as to time either with the proffered testimony of Oliveri's helpers or the evidence at the trial of the suspension of cutting operations during part of the period (see note 15, *supra*). The court found, finally, that the claim that the Government had suppressed Oliveri's testimony was incredible for a number of reasons: the denials by Agent Good and the Government attorney of the statements attributed to them; the lack of any reason for them to fear Oliveri's testimony and the likelihood that it could in fact be turned to the Government's advantage on cross-examination; the inconsistency of Oliveri's immediate report of the interview to defense counsel with his claim of having been successfully intimi-

dated; and the absence of any reason for the Government to believe that petitioners were not already aware of Oliveri's activities.

Argument

1. Petitioners' attack upon the Government's "accounting" of the cloth not returned under the contracts misconceives the role of that evidence in the Government's case. The Government proved by direct evidence the sale by Abrams of 19,000 yards of olive-drab wool serge at a time when Abrams had possession of large quantities of such cloth furnished by the Government. The inference that the cloth sold was the Government's was supported by the surreptitious manner of payment; the fact that the sale was at somewhat less than the market price; the finding of a Government mill ticket at the Mayflower premises where the cloth sold was admittedly stored;[11] the flight of petitioner Berman to avoid inquiry about the sale; the concealment by petitioner Abrams of Berman's whereabouts; and the effort by Abrams, after the F.B.I. investigation began, to retrieve from the trucking company the receipts showing the deliveries of cloth to Alert (see Statement, *supra*, pp. 4–6). With this direct proof of a sale of cloth under circumstances themselves indicative of a

[11] There was testimony that Fabric did for a time, because of a shortage of storage space, store cut jacket parts on the first floor of the Mayflower premises, and that one of Fabric's employees also saw a box of piece goods tickets there (Statement, *supra*, p. 10). No explanation was offered for the presence of the piece goods tickets, however, and the Government mill ticket was in any event found on the second floor.

misappropriation of the Government-furnished cloth, the Government's further proof of the amount of cloth not returned under the contracts was merely corroborative—it negatived the possibility that all of the cloth furnished had been returned and hence could not have been the source of that sold. The accounting was not, as in the net worth tax cases relied upon by petitioners, made the primary proof of the crime charged, and hence those cases are not in point.

Petitioners' criticism of the accounting, moreover, is premised upon attributing to each step of the accounting a purpose it was never intended to serve. The "paper test" was used only as a way of measuring the area of a pattern, and its validity for that limited purpose cannot be questioned. The area of the patterns was then related to the area of cloth actually contained in the finished garments by testimony that the garments were accurately cut from the patterns. Adding the yardage contained in the delivered garments to the scrap actually returned[18]

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[18] The scrap, measured by weight, was converted to yards at the ratio of 18 ounces per linear yard. Petitioner Abrams contends (No. 733, Pet. 9, footnote) that the weight of wool serge varies as much as 12% per linear yard. The testimony at the trial, however, showed that while a linear yard of wool serge might weigh as little as 17.5 ounces (about 3% underweight), the balance of the 12% variation between extremes would be overweight goods (R. 514). The use of 18 ounces as the stated weight per linear yard thus tended to overstate the number of linear yards returned as scrap, which in turn benefited petitioners by understating the shortage. The objection that the scrap was not conditioned before weighing (No. 733, Pet. 9) is similarly without substance. There was no testimony that unconditioned scrap would weigh appreciably

gave the total amount of cloth physically returned to the Government. The balance represented simply the amount of cloth furnished by but not physically returned to the Government—or, as described on the Government's exhibit, the "Serge unaccounted for and not returned to QM" (No. 732, Pet. 54).

The Government's accounting, therefore, established only the gross amount of the shortage and did not purport in itself either to prove a misappropriation or to disprove manufacturing losses. Where the shortage had gone was left to other proof. Some of the shortage was admittedly due to the use of scraps for incidental purposes and the throwing away of clippings which had fallen to the floor. There was direct evidence, however, to show that Fabric's cutters minimized waste in their use of the cloth, using first-class commercial practices, and that the losses of scrap in incidental uses and sweepings could not possibly have been as much as the shortages. While it was obviously impossible to prove the exact amount of the incidental losses, the cloth petitioners were alleged to have sold (19,000 yards) was less than two-thirds of the shortage under the first two contracts (30,793 yards) and much less than one-half of the total shortage (46,451 yards), thus allowing a wide margin for unrecovered waste.

Whether or not the evidence of the gross shortage and of the small amount of the incidental losses would be enough alone to support the convictions—

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less than conditioned scrap, and the inevitable presence in unconditioned scrap of foreign substances would indicate just the opposite.

the question seemingly argued by petitioners—that evidence combined with the direct proof of the sale and of the surrounding circumstances indicating a conversion of Government property was, we submit, more than sufficient to support the verdicts. The question in any event is solely one of the sufficiency of the evidence and presents no question appropriate for review by this Court.[19]

2. As this Court noted in *United States* v. *Johnson*, 327 U.S. 106, where a trial judge who conducted the trial has considered the affidavits and counter-affidavits on a motion for a new trial on the ground of newly-discovered evidence, and has denied such application, it is not ordinarily the function of an appellate tribunal to review such finding. This Court said (p. 111) that it is "important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances * * *." We think that there are no such circumstances in the present case.

The trial court expressly found that defense counsel knew, or at least ought to have known, of Oliveri's

[19] Petitioners' claim that they were denied the right of cross-examination (No. 732, Pet. 19–20; No. 733, Pet. 26–29) is but a re-casting, in constitutional garb, of their claim that crucial elements of proof were lacking. They obviously could not cross-examine a witness who did not testify, but the defect, if any, would be the failure of proof, not the denial of cross-examination. And they did in fact cross-examine all the witnesses who had anything to do with the measurement of the area of the patterns, which is all the "paper test" purported to be.

claimed sales of scrap prior to the trial. The claim that scrap falling to the floor was swept out as trash was a major line of defense at the trial, one that was argued and reargued on behalf of all the petitioners. With the case in that posture it seems hardly likely that defense counsel failed to talk to Oliveri—who was in charge of sweeping out the cutting rooms—about sales or other disposition of scrap.[*] Oliveri had spoken to petitioner Abrams or Hyman about the disposition of dirty scrap during the life of the contracts, and they were surely aware of the trade custom regarding the sale of scrap, since defense counsel mentioned it during trial. Defense counsel talked to Oliveri twice before trial and rejected him as a witness because of his criminal record, not because he had nothing to contribute.[*] If it occurred to Oliveri to mention the sale of scrap to the Government's attorney, it must also have occurred to him to tell defense counsel of these activities.

Even if in fact defense counsel did not know before trial that Oliveri claimed to have sold scrap—though the district court concluded that they did—the rule governing new trials "requires due diligence of him who invokes it" (*United States* v. *Costello*, 255 F. 2d 876, 879 (C.A. 2), certiorari denied, 357 U.S. 937) and due diligence before trial would have unearthed the evidence which is to be found in the affidavits filed in support of the motion for a new trial. In these circumstances, the

[*] It is also true, as the district court pointed out, that Oliveri's evidence—which afforded no firm facts from which calculations could be made—would have been inconclusive and, because of the effect on the jury of the admission of diversion of Government cloth, dangerous as well.

affidavits supporting the motion for a new trial amount to "much less than enough to show any abuse of discretion in the denial of the motion." *United States* v. *Cordo*, 186 F. 2d 144, 148 (C.A. 2), certiorari denied, *sub nom. Minkoff* v. *United States*, 340 U.S. 952; *United States* v. *On Lee*, 201 F. 2d 722, 723-724 (C.A. 2), certiorari denied, 345 U.S. 936.

The claim that the Government intimidated Oliveri and suppressed his testimony is equally without substance and was properly rejected by the district court.

3. In March, 1953, Joel R. Strykower, the military apparel designer at the Philadelphia Depot (R. 345), had made a set of paper patterns to be used for the paper test for this case (R. 364–365, 407). An affidavit made by him three days after the patterns were cut was used to refresh Mr. Strykower's recollection at the trial, and the affidavit was then turned over to defense counsel (R. 406–407). Strykower was also in possession of another affidavit made shortly after the first one. The trial judge examined the second affidavit and stated that it had no connection either with the patterns or with the testimony which had been given by the witness (R. 407–408). He therefore decided to "hold it for the time being" rather than turn it over to defense counsel (R. 408–409). Defense counsel offered no objection when the judge declined to turn over the second affidavit (R. 407–409).

It later developed that the sets of paper patterns which Strykower had made in 1953 had been made from the wrong master patterns and were ¼ to 5/16 inch shorter than the master patterns furnished to Fabi (R. 388–389, 410–411). The trial was ad-

journed and new sets of paper patterns for the test were made which were identical to the master patterns furnished to Fabric (R. 412–413, 448–458). The computations of the area of cloth contained in the jackets made by Fabric were made on the basis of this second set of paper cuts (R. 459, 541).

Contrary to petitioners' contention (No. 733, Pet. 24–26), the incident with respect to the second Strykower affidavit made in 1953 presents no issue under *Jencks* v. *United States*, 353 U.S. 657, or 18 U.S.C. (Supp. V) 3500. The trial judge did not flatly reject defense counsel's demand, but only decided to hold the affidavit "for the time being", thus indicating that it would have been turned over, as the first one was, if the further testimony had indicated that it was relevant. Thereafter, the whole matter became moot when it developed that the 1953 paper patterns had been taken from the wrong master patterns, and defense counsel did not mention the affidavit again.

4. Petitioners contend (No. 732, Pet. 21–23) that they were prejudiced by the testimony of Cooper regarding Hartman's offer to sell him cloth (Statement, *supra*, p. 5, fn. 6). The testimony was clearly admissible against Hartman notwithstanding his ultimate acquittal. The trial court explicitly instructed the jury at the time the testimony was given that the statements made by Hartman to Cooper were not admissible against petitioners "unless at the conclusion of the trial you should conclude that there was a conspiracy among the four defendants [*i.e.*, Abrams, Berman, Hyman, and Hartman], that Mr. Hartman was in a sense acting as an agent for the other three"

(R. 45). Petitioners were entitled to no more than that (*Lutwak* v. *United States*, 344 U.S. 604, 619; *Blumenthal* v. *United States*, 332 U.S. 539, 559–560), and it is to be presumed that the jury heeded this instruction (*Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95).

5. Prior to trial, the defendants Fabric, Abrams, and Hyman moved for and were allowed a bill of particulars as to the time and place of the submission of the false statements alleged in the false-statement indictment (No. C 144–185), arguing that they needed such information to determine whether the venue was properly laid (SR. 2a). At the trial, the Government's evidence showed that the statements as to the inventories and returns of property were submitted to the New York Quartermaster Procurement Agency in the Southern District of New York (R. 664, 716–735, Gov. Exs. 21–A–1, 24–A–4, 24–A–1, 24–A–2). After the Government had completed its case, defendant Hyman moved for a judgment of acquittal, one ground being that the Government had failed to prove venue as to the false statement offenses and presumably also as to the conspiracy count of indictment No. C 144–188, which alleged the false statements as overt acts (R. 38; SR. 8a–12a). The trial judge submitted the question of venue to the jury, requiring it to find that the false statements were directed to an officer within the Southern District and that the defendants knew and in-

tended this (R. 664–665). By their verdict convicting Hyman (reversed on appeal on other grounds); the jury upheld the venue.

Petitioners contend that venue as to the conspiracy count was not proved (No. 732, Pet. 24–25). In the circumstances related above, petitioners lack standing to raise the issue. The only objection on this score was not interposed until the Government had completed its case, and even then it was raised only by Hyman, primarily as an objection to the false statement counts. Even assuming that petitioners are entitled to invoke Hyman's motion, the objection came too late. *United States* v. *Miller*, 246 F. 2d 486, 488 (C.A. 2), certiorari denied, 355 U.S. 903; *United States* v. *Spagnuolo*, 168 F. 2d 768, 771 (C.A. 2), certiorari denied, 335 U.S. 824; *Hagner* v. *United States*, 54 F. 2d 446, 447–449 (C.A.D.C.), affirmed, 285 U.S. 427.

In any event, this contention is utterly without merit. As the court of appeals noted, the false statements were also alleged as overt acts in the conspiracy count, and it was shown that the statements were submitted to, and found in the files of, a Government office located in the Southern District. That was enough to show venue in the Southern District of New York. 18 U.S.C. 3237; *United States* v. *Miller*, *supra*, 246 F. 2d at 488; *De Rosier* v. *United States*, 218 F. 2d 420, 422–423 (C.A. 5), certiorari denied, 349 U.S. 921.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 732

MURRAY BERMAN and MAYFLOWER MANUFACTURING CORP.,
Petitioners

—v.—

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. The Government's brief underscores the urgency for certiorari here in light of the refusal below to observe the rules of *Holland* v. *United States*, 348 U. S. 121 (see Pet. 15-18).*

The Government does not question our reading of *Holland* to impose rules of judicial administration not only for net worth tax prosecutions but also for other criminal cases where proof of guilt likewise lies in accounting tabulations. What the Government says is that those rules are

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* The reference "Pet." is to our petition (in No. 732). The reference "Gov't. Br." designates the Brief for the United States in Opposition. The reference "R —" is to the printed record.

inapplicable here because the accounting in this case "was not, as in the net worth tax cases . . . , made the primary proof of the crime charged, and hence those cases are not in point" (Gov't. Br. 16). But, as the record discloses, this is just not so.

Government Exhibit 177, the purported accounting of the alleged shortage of Government serge, and the "paper test" from which it was largely derived constitute not only the "primary proof" offered by the Government on the substantive charge, but practically the only proof on the conspiracy charge. It is not our petition but the Government's brief which "misconceives the role of that evidence in the Government's case." (*id.* 15).

The Government concedes that the only *direct* evidence adduced by the prosecution was that petitioners, on Abrams' behalf, sold 19,000 yards of serge at a time when Abrams' concern, Fabric Garment Co., was in possession of substantial quantities of Government serge (*ibid.*).[1] That evidence, however, did not establish what was vital to the prosecution: that the 19,000 yards sold was *Government* serge. This, we contend, the jury was asked to and improperly did infer from the "paper test" and the accounting tabulation —all without regard to the procedural safeguards *Holland* imposes. The Government, on the other hand, now insists that such accounting evidence was "merely corroborative" (*id.* 16), that identification of the 19,000 yards as Government property was established not from that evidence but by reasonable inference from "the surrounding circumstances" (*id.* 18). Let us therefore look at the record.

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[1] Abrams and Fabric, co-defendants, are the petitioners in No. 733.

These so-called "surrounding circumstances" of which the Government speaks are listed on page 15 of its brief. We consider them *seriatim*:

(a) First, there is the "surreptitious manner of payment" for the 19,000 yards sold to Alert Trading Co. By this, it appears, is meant the issuance of the $15,000 check from petitioner Mayflower's account, made payable to Abrams' Washington attorney, and the subsequent purchase by that attorney of two oil leases for Abrams at a cost of $15,000 (Gov't. Br. 5). Since it is not disputed that the sale was for Abrams' account; and that the proceeds, though deposited initially in Mayflower's bank account, belonged to Abrams, except for the commission payable to Berman; and that Abrams duly reported receipt of the entire proceeds, less commission, on his income tax returns—we find it most difficult to conceive how one reasonably can infer from this "circumstance" that the 19,000 yards sold to Alert was Government serge. Issuance of a check by a debtor payable to a third party designated by the creditor is by no means an unusual occurrence in the business world; certainly it is not a "surreptitious" device or one indicative of criminal conduct.[2]

(b) Second is the fact that the sale to Alert was "at somewhat less than the market price." This "circumstance" likewise is hardly indicative of theft; particularly in light of the testimony that Abrams had for some years previously

[2] The Government's brief (p. 5) suggests that the bank account in which the proceeds of the Alert sale were deposited was "opened by Berman in Mayflower's name" for that very purpose. This is belied by the record. The Mayflower account was opened, presumably in the normal course of business, on July 27, 1950, long before the inception of the conspiracy charged here (R. 532).

been in possession of quantities of substandard serge, a much more reasonable explanation for the small difference in price ($3.90 as compared with $4.25) (R. 587-588, 590-591).

(c) Third, there is the "finding of a Government mill ticket at the Mayflower premises where the cloth sold was admittedly stored." As the Government notes, however, the existence on the Mayflower premises of a mill ticket originally attached to Government goods furnished to Fabric is not, in itself, proof that the 19,000 yards of serge sold from those premises were Government goods; for there was testimony that for a time Fabric had stored mill tickets removed from Government goods on those very premises (R. 632). More significantly, the record discloses that the mill ticket on which the Government relies (Exhibit 6) *could not possibly have been related to the 19,000 yards of serge sold to Alert.* That mill ticket identified and came from a shipment of goods which was not shipped to Fabric *until March 17, 1951,* and the Government concedes that the allegedly misappropriated serge "had been delivered by Abrams to Berman [that is the Mayflower premises] *in January or February, 1951*" (Gov't. Br. 4).[3] Thus, the mill ticket in question could not conceivably have established that the 19,000 yards of serge sold to Alert was part of the serge furnished by the Government to Fabric.

[3] That the goods identified by the mill ticket were not shipped until March 17, 1951, appears from Exhibit 21-B-16, the Quartermaster's tally sheet, which lists among the rolls of serge shipped on that day, Piece No. 616146, the very number appearing on the mill ticket in question. That the ticket indicates that the goods it identified had been shrunk at the Quartermaster Depot on January 25, 1951 (see Gov't. Br. 6) does not, of course, establish when it was delivered to Abrams, except that such delivery could not have been earlier than January 25, 1951.

(d) Fourth are the "flight of . . . Berman to avoid inquiry about the sale" and "the concealment by . . . Abrams of Berman's whereabouts." Here, again, there is a marked misconstruction of the record. For, there is no evidence whatever to show that Berman knew, when, on December 27, 1951, he registered at an Atlantic City hotel, that the FBI had been inquiring for him a week earlier. Abrams had been so advised, but there is nothing to indicate that Abrams had told Berman. All that appears is that Berman, with his place of business closed, elected to spend New Year's Day and the ensuing weeks in a resort community and registered at a hotel there under a name different from his own. It is most unfair for the Government to exploit the coincidence in time between Berman's Atlantic City holiday and the initiation of the FBI investigation to create an unwarranted atmosphere of suspicion and crime.[4]

(e) Finally, there is Abrams' effort "to retrieve from the trucking company the receipts showing the deliveries of cloth to Alert." The pertinent evidence in this respect, again given undue and improper emphasis in the Govern-

---

[4] The extent to which the Government is prepared to strain the record is exemplified here. Thus, there is no evidence to support the Government's statement that Abrams "denied having seen Berman" (Gov't. Br. 5). The testimony is merely that when the FBI agent asked Abrams if he knew Berman's whereabouts or how the agent might get in touch with him, Abrams replied that Berman came into his plant from time to time, that he thought Berman lived in White Plains, New York, but that he neither knew his home address nor how to get in touch with him. There is nothing inconsistent between Abrams' reply and the advice given to the FBI agent by co-defendant Hyman that Hyman had seen Berman in the Fabric plant some three weeks before February 12, 1952. *For, there was no testimony whatever that Abrams was in the plant at the time Hyman said he saw Berman there.* (See R. 67-69).

ment's brief, was simply that when Abrams asked for these receipts, the trucker inquired whether he wanted them for any particular reason, whereupon Abrams responded that he wanted them; and that when the trucker gave Abrams photostatic copies of the receipts, he "was really mad about it" (R. 151). Here, again, it is impossible reasonably to read into this "circumstance" proof of guilt.

In short, these several "surrounding circumstances" comprise the weakest of reeds on which to support an inference of criminal conduct, let alone to support guilt beyond a reasonable doubt. Whether viewed singly or in combination, they certainly fall far short of such proof as warrants the submission of a criminal case to the jury. This, the prosecution here realized; and, consequently, the "paper test" and the accounting tabulation derived therefrom were put in evidence and stressed as major proof of the alleged misappropriation of Government surge. This accounting evidence was the very heart of the Government's case in support of its charge of theft against petitioners.

Beyond this, such accounting evidence was practically the *only* proof offered in support of the conspiracy count against petitioners. The conspiracy charged was to submit false statements to the United States. There was no evidence whatever that petitioners here knew that such statements were required to be filed or were in fact filed. The only proof in support of their conviction was that offered in connection with the falsity of the statements. And that proof consisted solely of the accounting tabulation.

In these circumstances, the rules announced by this Court in *Holland* were brought into play and, as the Government itself now appears to concede, should have been observed.

2. To our argument that petitioners were here denied the right of effective cross-examination as to the validity of the "paper test" (Pet. 18-20); the Government, admitting that no witnesses as to its validity were offered for cross-examination (Gov't. Br. 18, n. 19), cavalierly responds that that was of no significance because the " 'paper test' was used only as a way of measuring the area of a pattern, and its validity for that limited purpose cannot be questioned" (*id.* 16).

The fact is, however, that the "paper test" was much more vital to the prosecution than the Government's brief now suggests. It is a relatively simple matter to measure the area of a paper pattern; and, had that been the only function of the test, there would have been no dispute. What the prosecution did at the trial, however, was to equate their measurements of the paper pattern areas, made under laboratory conditions, to areas of serge cloth produced under actual high-speed manufacturing conditions. It was the validity of such an equation, treating laboratory paper measurements as actually representing parts of manufactured jackets that was in issue, and most vital to the Government's case. That such an equation was most vital to the prosecution is plain when one realizes that the figures in the third line of Exhibit 177 ("Yards of Serge, etc.") are derived from this "paper test." And, since, as is conceded, no witnesses were offered to testify as to the propriety of the translation effected from paper to serge, petitioners could [illegible] ssibly cross-examine as to the validity of the procedure.

It is significant that when public officers have sought to utilize similar experimental devices to measure areas of cloth in connection with accountings under Government contracts, their efforts have been rejected by Government appeals boards. See *Keystone Coat & Apron Mfg. Corp.*, ASBCA No. 4446, Navy Appeals Panel, Jan. 13, 1959, 59-1 BCA par. 2056; *Langwear, Inc.*, ASBCA No. 3607, Navy Appeals Panel, June 18, 1957, 57-1 BCA par. 1336. As the board stated in the Keystone proceeding: ". . . The method by which the Government measured the scrap in its post-contract audit was . . . an entirely theoretical one, the result of measurements and computations made by one who had no part in and did not observe the actual production of the trousers. . . . The reliability of the Government's actual measurements could not be adequately tested by cross-examination." If such devices as the "paper test" are deemed unreliable in proceedings involving only contract accountings, how much more must they be condemned where, as here, they have been utilized in a criminal case involving the liberties of the accused.

3. Defending the trial court's denial of petitioners' motion for a new trial, the Government's brief (p. 18) cites *United States v. Johnson*, 327 U. S. 106, where this Court noted the importance "for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances . . . ." (At 111). In our case, however, there was no "conflicting evidence" as to the newly discovered evidence. The several affidavits of the defendants and their counsel averred that although Oliveri had been interviewed prior to trial, he had not advised

them and they did not know that, for a period of some years, he and others in Fabric's employ had been selling large quantities of serge scrap sweepings to junk dealers. Nor was there any dispute that Oliveri had so informed the Government prosecutors prior to the trial and that they in turn had withheld this information from court and jury. What was so shocking was that notwithstanding the absence of conflicting evidence, the trial court cavalierly rejected the sworn statements of the defendants and of their counsel as unworthy of belief. The Government's brief does the same (p. 19).

The tremendous importance of the newly discovered evidence relating to Oliveri and his fellows was that thus, for the first time, the defendants could essay some measurement of that scrap concededly being engendered in the manufacturing process and being disposed of without accounting to the Government. For the first time there was proof that such scrap was so substantial in quantity as to make it impossible that the 19,000 yards of piece goods (as contrasted with scrap!) sold to Alert had been a portion of the Government-furnished serge.

Certainly, in such circumstances and in view of the Government's suppression of the Oliveri evidence throughout the trial, denial of the motion for a new trial was a grievous error.

CONCLUSION

For the reasons stated in our petition and in the petition in No. 733, a writ of certiorari should issue.

Respectfully submitted,

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May 8, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 733

FABRIC GARMENT CO., INC., and JOSEPH ABRAMS,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONERS FABRIC GARMENT CO., INC., AND JOSEPH ABRAMS.

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Statement.

We shall deal with certain aspects of the statement of facts of the United States contained in its brief at pages 3 through 15 in our argument. Here, we merely note two propositions:

(1) On the United States' own statement it is impossible that the wool serge sold by Abrams could have been Government-furnished property.* For the United States concedes this wool serge was delivered to Berman in January or February, 1951 (Brief, p. 4). But the Record shows that the second contract was not awarded until March 10, 1951 (Govt. Exh. 18), contrary to the assertion of the United States (Brief, p. 4) that it was awarded on February 20. And the so-called shortage on the first contract, which

* Surplus O. D. wool from World War II was a common article of private commerce in the years in question.

is the only one which was awarded prior to the end of February 1951, was only 4,974 yards (Petition, App. D, p. 59).

(2) The United States seeks by its statement to clothe the facts in the garb of conspiracy. To do so, it implies facts which the record refutes. For example, it asserts at page 5 of its brief that checks received from Alert in payment for the serge were deposited "in a bank account opened by Berman in Mayflower's name". The Record reference cited does not support the assertion that the account was opened "by Berman in Mayflower's name" nor the implication that it was opened for the purpose of receiving such payments. Indeed, the Record is perfectly clear that the bank account was opened by Mayflower, acting through its President, Berman, in 1950, long before the transactions involved in this case (R. 532).*

Argument.

We will adhere to the questions presented in our petition and discuss the response of the United States thereto.

QUESTION 1.

The brief for the United States confirms our assertion that the decision below conflicts with the decision in *Holland* v. *United States*, 348 U. S. 121, and related cases.

A. The purported distinction of the net worth cases found in the brief for the United States in fact renders them squarely applicable.

In seeking to distinguish the net worth cases, the brief for the United States unwittingly concedes their square

* References designated "R" are to Defendants-Appellants' appendix in the Court below.

applicability. The brief does not seek to sustain the validity of the distinction relied upon by the Court of Appeals. Instead it argues that

> "The accounting was not, as in the net worth tax cases relied upon by petitioners, made the primary proof of the crime charged, and hence those cases are not in point" (Brief, p. 16).

By indirection, the United States concedes that even in its view, where the "primary proof" consists of an accounting, the net worth cases apply. On this concession, this Court should grant *certiorari* on the first question presented.

For the petitioners were convicted on ten counts.* Eight of those ten charged the making of false statements that all of the wool furnished by the Government had been returned to the Quartermaster *or* transferred as authorized (four counts) and that only certain quantities of wool were "on hand" at the conclusion of each contract (four counts). A ninth count charged a conspiracy to make the false statements.**

The "primary proof"— indeed, the *only* proof—of the alleged falsity of the statements which is charged in the nine counts was the incomplete accounting (Govt. Exh. 177). And so, in substance, the jury was charged by the trial Court when it said:

---

* The Court of Appeals reversed as to two of these.

** Proof of the alleged falsity of these statements was also an essential element on the tenth count charging sale, as our petition pointed out. Indeed, the brief for the United States, p. 6, plainly states that this proof supported the inference that the goods sold were Government property. And the Trial Judge, in denying the motion for a new trial noted that "These computations disclosed the shortage . . . which was claimed to have been the source of the 19,000 yards of serge which Abrams and Berman sold • • •" (R. 916).

"The fourth question is, was the statement false? Did it conceal in each case the retention of an amount of the O. D. serge?

"In that respect we get into this paper test. The Government claims that the records show the gross yardage sent to the contractor, to Fabric Garment Co., Inc.; that the paper test shows (2004) how many yards went into these garments, and that by the weight of the scrap returned they can compute the equivalent in yardage, and they claim that when that is all done there is a shortage, I think, of about 46,000 yards" (R. 666).

[The Court then summarized the defendants' contentions.]

"That is the broad outline of the controversy, and as to these charges, without suggesting that one thing is more important than another, that has been, in point of time consumed, *perhaps the principal issue underlying this controversy, whether these were true or false statements.*" (R. 666) (Emphasis Supplied)

Lest there be any question, in denying the petitioners' motion for a new trial, the trial Judge specifically held:

"The government's computation was as follows: As to each of four contracts involved, it added to the yards contained in the delivered jackets, the yards returned as scrap and the inventory reported by defendants as remaining at the conclusion of the contracts; the total of these amounts was then deducted from the total linear yards of serge delivered to defendants for the contracts. *These computations* disclosed the shortage of approximately 50,000 yards *which was the basis of the charge of filing false statements and which was claimed to have been the source of the 19,000 yards of serge which Abrams and Berman sold privately in August, 1951.*" (Emphasis supplied) (R. 916).

It follows that even if the argument made by the United States—that the net worth cases apply only when the accounting is the "primary proof" of the crime charged—is valid—which we very much doubt—the net worth cases are, on the Record in this case, squarely applicable.

B. The United States has conceded that its accounting was false, its chart was false, and the equation both declared was false.

In its brief to this Court, the United States argues that the accounting was not intended to prove any more than the amount of wool not returned to the Government (Brief, pp. 16-17) and that petitioners' criticism is premised upon attributing to the accounting a purpose it was not intended to serve—*i.e.*, proof of wool unaccounted for by evidence of lawful use, and therefore available for unlawful sale; proof of wool "on hand" when the inventory statements were made; and proof of wool not "returned or transferred as authorized" as the certificates of return stated.

If this is so, the proceedings below were based upon a false and misleading premise. The Government asserts that the accounting purported merely to show yardage "... furnished by the government under ... contract[s] which [was] not accounted for by the jackets and returned scrap" (Brief, p. 8). But the accounting, Government Exhibit 177, simply does not state what the United States says it states. For the accounting says the yardage was "unaccounted for *and* not returned", not "unaccounted for *by* return".

The exhibit, like the prosecutor's opening (quoted in our petition, p. 21), his Statement of Facts, his summation,

the testimony he tendered* and the Court's charge (quoted above, p. 4) all made the same assertion; all of them told the jury that non-return equaled shortage available for unlawful sale and proved the falsity of the statements.

The United States has now conceded that the account does not support such a premise. That knocks out the premise upon which the convictions were obtained. On that concession alone, *certiorari* should be granted.

Moreover, in order to sustain its assertion that the accounting had a limited purpose, the United States has been forced to attribute to the Record evidence which it does not contain. Thus it asserts that

> "There was direct evidence, however, to show . . . that the losses of scrap in incidental uses and sweepings could not possibly have been as much as the shortages" (Brief, p. 17).

---

* The record is replete with assertions by the Government that the computations showed a shortage unaccounted for *by anything*. Thus, the Government's Statement of Facts (Appellee's Consolidated Appendix, p. 3a) which was given to defendants and the trial judge prior to trial states that the accounting "• • • shows Fabric Garment did not account for *or* return to the Quartermaster • • •" the allegedly missing wool.

And in introducing the Accounting Chart (Government Exhibit 177) the prosecutor asked:

> "Q. And did you compute the resulting shortage *which these figures show?* A. I believe that there is a schedule over here" (emphasis supplied) (R. 558).

And in his summation, the prosecutor stated:

> "What about all the mathematical computations that the chart showed? • • • And what did the computations finally come down to, giving them the maximum credit that they could get by using the paper test? They were short 4974 linear yards, 56 inches wide [on the first contract].
>
> "[On the second contract] they were short 25,819 yards.
>
> "On the third contract they were short 14,084 yards, and on the fourth contract, 1,574 yards" (Transcript, p. 1979).

If one fact is clear in this record it is that the United States repeatedly relied upon the figures in its accounting to prove shortage, falsity of the statements, withheld inventory and unlawful sale; not merely the amount of wool returned to the Quartermaster.

The Government is driven to this assertion as a justification of a gross violation of the *Holland* rules. This assertion cannot be supported.

There is, significantly, no Record reference to support the assertion and the only "evidence" which the United States could glean from this 2,000-page Record, which even remotely relates to the subject (Brief, p. 9), was a statement by one of its witnesses that 60,000 yards of wool were not used "in cleaning the machines"! (R. 333-34).* There is not a word in the trial Record as to how much wool went into the other, more significant, incidental uses.** The only evidence before any of the Courts which have considered this issue is that contained in the papers on the motion for a new trial. That evidence wholly refutes the United States' unsupported assertion that the amount of wool thus consumed was "small" or that it could not possibly have equalled the alleged shortage.***

C. The United States is unwilling to dispute the propriety of throwing away soiled scrap; its failure to dispute the clear showing that such action was authorized destroys the accounting and the convictions for making false statements.

The United States declines to dispute our clear showing that the contracts and the contracting officer authorized consumption of scrap and non-return of soiled scrap (see

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* The Brief for the United States, at p. 9, inaccurately characterizes the testimony of the witness, whose testimony is correctly described in our summary above.

** Moreover, the fact that 60,000 yards were not consumed is hardly relevant to prove that 46,000 yards were not so consumed.

*** Moreover, the Court of Appeals—and the United States—expressly rejected our contention, made below, that "* * * the burden was on the Government to prove the amount of wool which permissibly (as they assert) went into scrap but was never returned or accounted for" (Petition, App. p. 41). Now the United States says it met that burden.

Petition, pp. 12 to 14). The United States avoids the question by asserting in a footnote on page 9:

> ". . . It seems immaterial to the questions in this case whether the throwing away of such scrap was authorized or unauthorized."

This statement reveals another false premise which induced the jury verdicts. For the prosecution told the jury of laymen in summation:

> "The Contract clearly calls for a return of that material" (R. 655).

Indeed, this assertion was the sole pseudological justification for admitting the incomplete accounting into evidence, as the Court of Appeals recognized (Petition, App. A, pp. 42-43).

If the consumption and disposition of soiled scrap were authorized, as they plainly were, the convictions for filing false statements of inventory on hand, for filing false statements that the property was "returned and/or transferred as authorized" and for conspiracy to file false statements must be reversed, because the scrap was "transferred as authorized", it was not "on hand" when the statements of inventory were made, and the statements are not false.

D. If the United States is right about the limited purposes of its accounting, the net worth cases were nevertheless applicable and disregarded because the charge to the jury failed to reveal this allegedly limited purpose and the jury as well as the Courts below were grossly misled.

In *Holland* v. *United States*, 348 U. S. 121, at page 129, this Court said:

> "Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions

on which it rests, and the inferences available both for and against the accused."

Applying this rule, the Second Circuit, in *United States v. O'Connor*, 237 F. 2d 466 (2d Cir. 1956), said, at page 470:

"But regardless of the weight of evidence tending to show the guilt of the accused, in order to justify a conviction of tax evasion obtained through resort to the net worth method, it is imperative that the jury comprehend the complex theory involved and that it appreciate the relevance of the evidence introduced in the application of that theory."

Accordingly, if the United States desires to use the accounting device for a "limited purpose", as it now suggests it intended below, the net worth cases nevertheless apply to require the limited purpose to be disclosed to the jury.

In the case at bar, the first disclosure of such a limited purpose came in the United States Supreme Court. There was no explanation of this limited purpose to the jury, to the defendants, or to the Courts below.

It follows, again, that the net worth cases were applicable and violated.

* * * * * * *

The United States has now had two years in which to suggest a tenable reason why the net worth cases are inapplicable in this case. The distinction suggested by it in its brief to the Court of Appeals was rejected by that Court, which came up with its own different distinction. That distinction, in turn, was rejected by the United States in its brief in this Court when it came up with a new and different distinction. That distinction, in turn, is equally invalid, and wholly incapable of administration, especially since it seems to depend upon the Court before which the Government is arguing as to whether the proof is primary or secondary.

In any event the United States has conceded that to the extent that the accounting was the primary proof of the crime charged the net worth cases are applicable. On this concession alone the convictions on seven of the eight counts which remain in this case should be reversed summarily, and the questions presented concerning the applicability of the net worth cases should be resolved by this Court.

QUESTION 2.

The rules of the *Jencks* case were violated in the case at bar.

The United States seeks to avoid the *Jencks* question by distorting the record and by the unsupported assertion that the question is moot.

First, the United States asserts that the trial Judge did not "flatly" reject defense counsel's request for the affidavit but only decided to hold the affidavit they requested "for the time being" (Brief, p. 21). This assertion is a distortion of the Record. For the Record is clear that the Court was requested to give defense counsel the affidavits and that he said:

> "There are two documents here, one dated the 10th of March, 1953, and one dated the 13th of March, 1953, and I am going to give counsel the one dated the 10th of March, 1953. The other one does not relate to the testimony of this witness as far as I can tell" (R. 407).
>
> "The 13th of March, 1953, is the one that I am withholding" (R. 407).

Notwithstanding this flat statement, colloquy continued. It is true the defense counsel did not follow the pattern established by defense counsel in *United States* v. *Dennis*, 183 F. 2d 201, aff'd 341 U. S. 494 (1951), where a ruling

by trial Judge Medina merely became the stimulus for further objections, arguments, motions and demands. We doubt, however, that the United States seriously urges that defense counsel are under an obligation to engage in such tactics. In the case at bar they made their request; the trial Judge "flatly" ruled that he was withholding the affidavit. Defense counsel were, we submit, under no obligation to go farther in order to attempt to persuade the trial Court of its error.

Moreover, the colloquy about "withholding it for the time being", upon which the United States relies, related not to delivering the affidavit to defense counsel but to *marking it as an exhibit for identification!* The following transpired:

> "Mr. Polakoff: We could have them both marked for identification?
>
> "The Court: Just mark that one that I referred to.
>
> (Marked Defendant's Exhibit 167 for identification.)
>
> "Mr. Polakoff: Will your Honor mark the other one?
>
> "The Court: As a matter of fact, you do (1046-A) not have it, do you? We can hold it for the time being" (R. 408-9).

The "time being" was short. For after one more exchange the Court decided to mark the other affidavit, saying:

> "Mark this other one Court's Exhibit I. There are two pages on that" (R. 409).

Next, the United States suggests that in some way "the whole matter became moot when it developed that the 1953 paper patterns had been taken from the wrong master patterns" (Brief, p. 21). This suggestion is specious.

The witness Strykower returned to the stand and testified at great length concerning both the earlier and later tests. The Government relied heavily upon his credibility and upon the integrity of the tests which he allegedly conducted in order to secure a conviction. We are baffled as to how his credibility or the integrity of his tests could possibly be deemed to be moot on this record.

Moreover, if one thing is clear from the record it is that the withheld affidavit did *not* relate to the 1953 paper patterns, as the United States erroneously suggests when it says the "matter" is "moot". Indeed, in withholding the affidavit from defense counsel, the Court said that he was giving defense counsel "anything that has a bearing on those patterns that were made up" (R. 407). It follows that the affidavit, according to the trial Judge, did *not* relate to the 1953 paper patterns but to something else.

The trial Judge withheld the affidavit on the basis of his *in camera* inspection, the affidavit did touch upon "the evidence and activities as to which [the witness] testified at the trial" (*Jencks* v. *United States*, 335 U. S. at 668), and the witness' credibility and the integrity of his tests remained a very substantial issue in this case. Only by imposing a novel and unjustifiable burden upon defense counsel or by reintroducing the rule requiring exceptions can it be suggested that the ruling of the trial Court did not violate *Jencks*.

QUESTION 3.

Petitioners were denied the right of cross examination.

The United States seeks to dispose of Question 3—the denial of the right to cross examine—by attempting to treat it as a failure of proof—not as a denial of cross examination (Brief, p. 18, footnote).

The United States overlooks the crucial fact that the United States Attorney himself did the testifying. He attempted to supply the missing link in the chain of proof which would make the paper test admissible and he was the witness who could not be cross examined.

As to this the United States says nothing.

Instead, it seeks to accord to the word "exactly" a meaning which it simply will not bear. For the United States asserts that the missing link between the paper test and the area of wool contained in the jackets was supplied by the testimony of a cutter that the jackets were cut "exactly the same as the pattern" (Brief, p. 7).

But the Record is clear that the word "exactly" when used by a cutter is insufficient to bridge the gap which the prosecutor himself filled. For the Record is undisputed that "exactly", when used by a cutter, may or may not mean that the parts of the jackets correspond with precision to the patterns. Indeed, the Government witness Strykower repeatedly testified that in the original paper test he cut the paper parts "exactly" according to the patterns (R. 398, 399, 404, 468-69, 364, 385). Yet it is conceded that the parts differed from the patterns by ¼ to 3/16 of an inch. And even the testimony upon which the United States relies—that of Schneider—shows that "exactly" did not mean precise correspondence to the pat-

terns. For after testifying that he cut "exactly" according to the patterns, Schneider went on to testify to differences between the patterns and the cut parts (R. 285-289; 317).

The adverb "exactly" is in itself a thin reed upon which to rest the validity of a complicated and purportedly scientific test. It is especially weak when used by a cutter to describe the high-tension factory operation in which he was engaged. At the trial, it did not purport to establish the essential link between the area of paper and the area of wool.

The fact remains that the only link between paper and wool was supplied by the unsworn and un-cross-examined statement of the prosecutor in the opening.

Miscellaneous.

In an attempt to find some justification for the outrageous testimony of witness Cooper which set the stage for this cloak-and-dagger trial of paper and wool and FBI chases, the United States cleverly suggests in a footnote on page 5 of its brief that Cooper was called because the initial report that Alert was selling wool "probably came" from Cooper. Of course, the Record nowhere supports this speculation, and Cooper's testimony remains totally unconnected to the issues in this case, highly prejudicial and grossly improper.

Conclusion.

The contradictions between the positions taken by the United States here and the positions it took in the Courts below, the concessions to which it has been forced, its dis-

regard of seven of the eight convictions remaining in this case, and the failure of the Record to support its present arguments are all symptoms of the grave violations of appropriate standards for the protection of defendants in criminal cases which took place below.

If ever a case called for the exercise by this Court of its power of supervision, it is this one. The petition should be granted.

Dated: New York, N. Y.
May 5, 1959.

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